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96TH CONGRESS } SENATE { DOCUMENT
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# THE CONSTITUTION

## OF THE

# UNITED STATES OF AMERICA

## ANALYSIS AND INTERPRETATION

## 1980 SUPPLEMENT

ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO JULY 2, 1980

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**P. 19, the signers for North and South Carolina should be:**

North Carolina
- W^M BLOUNT
- RICH^D DOBBS SPRAIGHT
- HU WILLIAMSON

South Carolina
- CHARLES COTESWORTH PINCKNEY
- CHARLES PINCKNEY
- PIERCE BUTLER
- J. RUTLEDGE

## AMENDMENTS PENDING BEFORE THE STATES

### Proposed Amendment XXVII

[p. 47]

As of December 1, 1980, 35 States had ratified the proposed Amendment, In addition to the 22 previously listed, they are: Wyoming, January 24, 1973; South Dakota, February 2, 1973; Minnesota, February 8, 1973; Oregon, February 8, 1973; New Mexico, February 12, 1973; Vermont, February 21, 1973; Connecticut, March 15, 1973; Washington, March 22, 1973; Maine, January 18, 1974; Montana, January 21, 1974; Ohio, February 7, 1974; North Dakota, February 2, 1975; Indiana, January 18, 1977. Four States have taken action to withdraw their ratifications. See *Infra, p. S77.*

### Proposed Amendment XXVIII

#### HOUSE JOINT RESOLUTION 554

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein)*, That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE

"SECTION 1. For purposes of representation in the Congress, election of the President and Vice President, and article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a State.

"SEC. 2. The exercise of the rights and powers conferred under this article shall be by the people of the District constituting the seat of government, and as shall be provided by the Congress.

"SEC. 3. The twenty-third article of amendment to the Constitution of the United States is hereby repealed.

> "SEC. 4. This article shall be inoperative, unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."

As of December 1, 1980, seven States had ratified the proposed 28th Amendment. They were: New Jersey, September 11, 1978; Ohio, November 30, 1978; Michigan, December 12, 1978; Massachusetts, March 19, 1979; Minnesota, March 28, 1979; Connecticut, April 11, 1979; Wisconsin, November 1, 1979.

# ARTICLE I—LEGISLATIVE DEPARTMENT

## Sec. 1—The Congress

### Delegation

**[P. 70, add to N. 22:]**

This language was again stated and applied in *Federal Energy Administration* v. *Algonquin SNG*, 426 U.S. 548 (1976).

**[P. 72, add to N. 16:]**

And note *National Cable Television* v. *United States*, 415 U.S. 336 (1974).

**[P. 78, following N. 24 in text, add:]**

Perhaps refining the delegation doctrine, at least in cases where Fifth Amendment due process interests are implicated, the Court held that a government agency charged with the efficient administration of the executive branch could not assert the broader interests that Congress or the President might have in barring lawfully resident aliens from government employment. The agency could assert only its own interests and if the action could be justified by other interests the office with responsibility for promoting those interests must take the action.[1.5]

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[1.5] *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976) (5-to-4 decision). The regulation was reissued by the President, E. O. 11935, 3 C. F. R. 146 (1976), reprinted in 5 U.S.C. § 3301 (app.), sustained in *Vergara* v. *Hampton*, 581 F. 2d 1281 (C. A. 7, 1978). The decision, Justice Stevens' first opinion for the Court, may be explainable not solely in terms of the delegation doctrine but as an aspect of "due process of lawmaking," *Delaware Tribal Business Comm.* v. *Weeks*, 430 U.S. 73, 98 n. 11 (1977) (Justice Stevens dissenting), borrowed from Linde, "Due Process of Lawmaking," 55 Nebr. L. Rev. 197 (1976), and applied in several contexts, *City of Eastlake* v. *Forest City Enterprises*, 426 U.S. 668, 680 (1976) (Justice Stevens dissenting); *Califano* v. *Goldfarb*, 430 U.S. 199, 217 (1977) (Justice Stevens concurring). A similar concept may underlay Chief Justice Burger's plurality opinion in *Fullilove* v. *Klutznick*, 448 U.S. 448, 472–473, 480–484 (1980), and may inform Justice Powell's opinion in *Regents of the Univ. of California* v. *Bakke*, 438 U.S. 265, 307–315 (1978).

### Investigatory Power

**[P. 80, add to N. 5:]**

For a reassertion of the broad congressional power of inquiry, see *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 503–507 (1975).

**[P. 96, add to N. 14:]**

Decision in *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975), largely if not completely bars the federal courts from interference with ongoing congressional investigations. One possibility remains open, that of enjoining a subpoenaed party from complying. See *United States* v. *American Telephone & Telegraph Co.*, 419 F. Supp. 454 (D.C.D.C. 1976), *vacated and remanded*, 551 F. 2d 384 (C.A.D.C. 1976), *further opinion*, 567 F. 2d 121 (C.A.D.C. 1977).

## Sec. 2, Cl. 1—Congressional Districting

### [P. 99, following N. 28 in text, add:]

Adhering to *Kirkpatrick* v. *Preisler*, the Court upheld a lower court voiding of a Texas congressional districting plan in which the population difference between the most and least populous districts was 19,275 persons and the average deviation from the ideally populated district was 3,421 persons.[1.5] However, the Court set aside the district court's choice of a districting plan which had been drawn up without reference to the plan the legislature had enacted, instructing the court instead to adopt an alternative plan which followed more closely the legislators' desires.[2.5]

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[1.5] *White* v. *Weiser*, 412 U.S. 783 (1973). Concurring, Justices Powell and Rehnquist and Chief Justice Burger noted that they would have decided *Preisler* differently but so long as the Court did not choose to reconsider it they agreed this case was controlled by it. Id., 798.

[2.5] The plan chosen by the district court had a slightly larger population variance than the alternative plan, but this point was not the basis of decision. Id., 795. Justice Marshall disagreed with this rationale. Id., 798.

## Sec. 4, Cl. 1—Federal Legislation Protecting Electoral Process

### [P. 110, add to N. 12:]

Comprehensive regulation is now provided by the Federal Election Campaign Act of 1971, 86 Stat. 3, and the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263, as amended, 90 Stat. 475, found in titles 2, 5, 18, and 26 of the U.S. Code. See *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

### [P. 111, add to N. 16:]

See also *Buckley* v. *Valeo*, 424 U.S. 1, 13 n. 16 (1976).

## Sec. 6, Cl. 1—Privileges

### [P. 120, add to N. 1:]

The holding was reaffirmed in *United States* v. *Helstoski*, 442 U.S. 477 (1979), in which the Court continued the distinction between permissibly proving the taking of a bribe for a promise to do a future legislative act and impermissibly proving the doing of a legislative act. The Court viewed the protection of the clause as so important to preservation of the separation of powers that, assuming that a Member could waive it, a waiver could be found only after explicit and unequivocal renunciation of the protection, not by failure to assert it at any particular point in the proceedings. Similar reasoning underlay the holding in *Helstoski* v. *Meanor*, 442 U.S. 500 (1979), that an indicted Member, whose motion to dismiss the indictment as barred by the speech or debate clause is denied, could immediately appeal the denial rather than await conviction and appeal.

**[P. 122, following N. 11 in text, add:]**

In the course of holding that a Member of Congress may be sued directly under the Fifth Amendment's due process clause for alleged gender discrimination, the Court said that *only* the speech or debate clause could shield an employment decision of a Member from judicial review.[1.5] Because the clause itself embodies the concerns of the separation of powers doctrine for the preservation of the independence of coequal branches of government, with respect to the legislative branch, no other constitutional provisions or implications from constitutional structure would preclude adjudication and decision of the validity of such a decision by the Member.[2.5] The critical importance of the clause and its interpretation to Members of Congress is thus greatly heightened.

Reflecting a general understanding of the limits of the clause, the Court in *Hutchinson* v. *Proxmire*[3.5] held that republication of allegedly defamatory remarks outside the legislative body, here through newsletters and press releases, was not protected. The clause protects more than speech or debate in either House, the Court affirmed, but in order for the other matters to be covered "they must be an integral part of the deliberative and comunicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with

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[1.5] *Davis* v. *Passman*, 442 U.S. 228, 235 n. 11 (1979). While the panel decision below, id., 544 F. 2d 865, 877–881 (C.A. 5, 1977), had denied speech or debate protection, the full court reversal on other grounds, id., 571 F. 2d 793 (C.A. 5, 1978) (*en banc*), had resulted in no decision on that question. The Supreme Court specifically intimated no view and the issue would have been considered on remand but for a settlement between the parties.

[2.5] Three of the four dissenters argued that the separation of powers doctrine precluded judicial review. *Davis* v. *Passman*, 442 U.S. 228, 249, 261 (Chief Justice Burger and Justices Powell and Rehnquist). But see *Hutchinson* v. *Proxmire*, 443 U.S. 111, 125 (1979) (opinion for Court by Chief Justice Burger) (alluding to "very purpose" of Constitution "to provide *written* definitions of the powers, privileges, and immunities granted rather than rely on evolving constitutional concepts. . . .") In other contexts, i.e., the Presidency, the Court has provided substantive content to separation of powers concepts. E.g., *United States* v. *Nixon*, 418 U.S. 683, 703–713 (1974); *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 441–446 (1977), and id., 504, 505–520 (Chief Justice Burger dissenting), 545 (Justice Rehnquist dissenting). In *United States* v. *Myers*, 635 F. 2d 932 (C.A. 2, 1980), the court treated separately claims of speech or debate immunity and separation of powers barriers to investigation and prosecution of a Member.

[3.5] 443 U.S. 111, 123–133 (1979).

respect to other matters which the Constitution places within the jurisdiction of either House." [4.5] Press releases and newsletters are "[v]aluable and desirable" in "inform[ing] the public and other Members" but neither are essential to the deliberations of the legislative body nor part of the deliberative process.[5.5]

More problematic and within the trend evident in *Gravel* and *Brewster* is the decision in *Doe* v. *McMillan*,[6.5] in effect limiting the protection of the speech or debate clause through an inquiry into the nature of the "legislative acts" performed by Members and staff personnel. A Committee had conducted an authorized investigation into conditions in the schools of the District of Columbia and had issued a report which the House of Representatives had routinely ordered printed. In the report, named students were dealt with in an allegedly defamatory manner and their parents sued various Committee Members and staff and other personnel, including the Superintendent of Documents and the Public Printer, seeking to restrain further publication, dissemination, and distribution of the report until the objectionable material was deleted and also seeking damages. The court held that the Members of Congress and the staff employees had been properly dismissed from the suit, inasmuch as their actions—conducting the hearings, preparing the report, and authorizing its publication—were protected by the speech or debate clause. The Superintendent of Documents and the Public Printer were held, however, to have been properly named, because, as congressional employees, they had no broader immunity, either under the speech or debate clause or under the common law doctrine of official immunity, than Members of Congress would have. At this point, the Court distinguished between those legislative acts, such as voting, speaking on the floor or in committee, issuing reports, which are within the protection of the clause, and other acts which enjoy no such protection. Public dissemination of materials outside the halls of Congress is not protected, the Court held, because it is unnecessary to the performance of official legislative actions. Dissemination of the report within the body was protected, whereas dissemination in normal channels outside it was not.[7.5]

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[4.5] Id., 126, quoting *Gravel* v. *United States*, 408 U.S. 606, 625 (1972) (emphasis omitted).

[5.5] *Hutchinson* v. *Proxmire*, 441 U.S. 111, 130, 132–133 (1979). The Court distinguished between the more important "informing" function of Congress, i.e., its efforts to inform itself in order to exercise its legislative powers, and the less important "informing" function, i.e., its efforts to inform the public about its activities. It was the latter function the Court did not find an integral part of the legislative process. See also *Doe* v. *McMillan*, 412 U.S. 306, 314–317 (1973). For similar analysis in a complex case in which dissemination of seized documents and conduct allegedly violating the Fourth Amendment were found unprotected, see *McSurely* v. *McClellan*, 553 F. 2d 1277 (C.A.D.C. 1976) (*en banc*), *cert. dismd. as improvidently granted sub nom. McAdams* v. *McSurely*, 438 U.S. 189 (1978).

[6.5] 412 U.S. 306 (1973).

[7.5] Id., 324.

Difficulty attends an assessment of the effect of the decision, inasmuch as the Justices in the majority adopted mutually inconsistent stands[8.5] and there were four dissenters who believed the acts complained of were wholly protected.[9.5] The case also leaves very much in doubt the propriety of injunctive relief to restrain publication or other actions of Congress.[10.5]

In *Eastland* v. *United States Servicemen's Fund*,[11.5] however, the Court held that the clause precluded suit against the Chairman and Members of a Senate Subcommittee and staff personnel, to enjoin enforcement of a subpoena directed to a third party, a bank, to obtain the financial records of the suing organization, The investigation was a proper exercise of Congress' power of inquiry, the subpoena was a legitimate part of the inquiry, and the clause therefore was an absolute bar to judicial review of the Subcommittee's actions prior to the possible institution of contempt actions in the courts. While the ruling would wholly preclude the object of an investigation from resisting the obtaining of records and information concerning him that were in the possession of third parties, the Court considered this interpretation required by the clause.[12.5]

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[8.5] Justices Douglas, Brennan, and Marshall, while joining the opinion of the Court, also joined in a separate opinion, which, contrary to the opinion of the Court, accepted the informing of the public as a legislative act but denied immunity in any event because in their view a legislative act that infringes upon the constitutional rights of citizens is subject to judicial review and remedial action in the federal courts. Id., 325. Compare *Hutchinson* v. *Proxmire*, 443 U.S. 111, 136 (1979) (Justice Brennan dissenting).

[9.5] Justices Rehnquist, Stewart, Blackmun, and Chief Justice Burger would have held all the legislative parties immune under the speech or debate clause, on the basis that all the actions complained of had been specifically authorized by the House. *Doe* v. *McMillan*, 412 U.S. 306, 331, 332, 338 (1973) (dissenting). For these Justices, the question of authorization apparently would be the distinguishing factor in *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979). But compare id., 133 and n. 11 (congressional provision of frank for dissemination cannot expand scope of clause).

[10.5] Justice Douglas' concurrence states without elaboration that the plaintiffs "are entitled to relief." *Doe* v. *McMillan*, 412 U.S. 306, 330 (1973) (concurring). Three of the dissenters argued that the principle of separation of powers forbade a court to grant the requested injunctive relief. Id., 343–345. Compare *Davis* v. *Passman*, 442 U.S. 228, 245, 246 n. 24 (1979), with id., 412 U.S., 249, 250–251 (Chief Justice Burger dissenting).

[11.5] 421 U.S. 491 (1975).

[12.5] "We reaffirm that once it is determined that Members are acting within the 'legitimate' legislative sphere the Speech or Debate Clause is an absolute bar to interference." Id., 503. Concurring, Justices Marshall, Brennan, and Stewart suggested without elaboration upon proper parties and procedures that a person who could not challenge the subpoena before the committee because it was not directed to him but to a third party might nonetheless be able in some circumstances to obtain judicial review. Id., 513. For one possible approach, see e.g., *United States* v. *American Telephone & Telegraph Co.*, 419 F. Supp. 454 (D.C.D.C. 1976), *vacated and remanded*, 551 F. 2d 384 (C.A.D.C. 1976), *further opinion*, 567 F. 2d 121 (C.A.D.C. 1977); *Ashland Oil Co.* v. *FTC*, 548 F. 2d 977 (C.A.D.C. 1976).

## Sec. 6, Cl. 2—Disabilities

### [P. 123, add to N. 3:]

Congress followed the same course when the President wished to appoint a Senator as Attorney General and the salary had been increased pursuant to a process under which Congress did not need to vote to approve but could vote to disapprove. The salary was temporarily reduced to its prior level, 87 Stat. 697 (1975), although constitutional questions raised in opposition caused Congress to include in the Act a judicial review provision not thereafter utilized. On the constitutional arguments, see *Hearings on S. 2673*, before the Committee on the Judiciary, 93d Congress, 1st sess. (1973). See also, 89 Stat. 1108 (1975) (reducing the salary of a Member of the Federal Maritime Commission in order to qualify a Representative).

## Sec. 7—Legislative Process

### [P. 127, following N. 14 in text, add:]

In *Kennedy* v. *Sampson*,[1.5] it was held that, in the absence of the evils deemed to bottom the Court's premises in the *Pocket Veto Case*—long delay and public uncertainty—an intrasessional adjournment or recess of Congress does not prevent the President from returning a bill which he disapproves so long as appropriate arrangements are made for the receipt of presidential messages during the adjournment.

### [P. 128, add new paragraph in text following N. 5:]

The proliferation of "congressional veto" provisions in legislation in recent years has raised a series of interrelated constitutional questions.[1.5] Congress, which until recently had applied the veto provisions

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[1.5] 511 F. 2d 430 (C.A.D.C. 1974). The Administration declined to appeal the case to the Supreme Court. The adjournment here was for five days. Subsequently, the President attempted to pocket veto two other bills, one during a 32 day recess and one during the period which Congress had adjourned *sine die* from the first to the second session of the 93d Congress. After renewed litigation, the Administration entered its consent to a judgment that both bills had become law, *Kennedy* v. *Jones*, Civil Action No. 74–194 (D.C.D.C., decree entered April 13, 1976), and it was announced that President Ford "will use the return veto rather than the pocket veto during intra-session and intersession recesses and adjournments of the Congress", provided that the House to which the bill must be returned has authorized an officer to receive vetoes during the period it is not in session.

[1.5] From 1932 to 1978, by one count 159 acts of Congress have contained 214 separate provisions giving the legislature direct review powers; substantially more than half of these have been enacted since 1970. A partial listing of such provisions is included in *The Constitution, Jefferson's Manual and Rules of the House of Representatives*, H. Doc. No. 95–403. 95th Congress, 2d sess. (1979), 721–860. The types of provisions vary widely. They may require congressional approval before an executive action takes effect but more commonly they provide for a negative upon executive action. See, e.g., the Congressional Budget and Impoundment Control Act of 1974, 88 Stat. 333, §§ 1012, 1013, 1017, 31 U.S.C. §§ 1402, 1403, 1407, which includes both forms. Congressional action may be by concurrent resolution of both Houses, Trade Act of 1974, 88 Stat. 1980, 19 U.S.C. §§ 2112, 2253, 2412, 2432, 2437, by resolution of only one House, Federal Pay Comparability Act of 1970, 84 Stat. 1946, 5 U.S.C. § 5305(c)(2), or by a committee of one House, P.L. 93–380, 88 Stat 545 (1974), 20 U.S.C. § 1853 (special education projects).

to some action taken by the President or another executive officer—such as a reorganization of an agency, the lowering or raising of tariff rates, the disposal of federal property—has now begun expanding the device to give itself a negative over regulations issued by executive branch agencies,[2.5] and proposals have been made to give Congress a negative over all regulations issued by executive branch independent agencies.[2.6] Constitutional opponents of the congressional veto argue that the device violates the presentation clause inasmuch as the congressional vote of disapproval is not submitted to the President for his action and that the device violates the separation of powers generally because it allows Congress to intrude upon the administration of the laws it enacts, contrary to the constitutional scheme whereby the President is authorized to perform this function. Proponents counter that the legislation containing the congressional veto is presented to the President and that his approval of it or its enactment over his veto satisfies the presentation argument; further, it is urged that Congress may utilize the device as to legislative authority that it has delegated to the President and as to which it retains supervisory authority. The

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[2.5] E.g., Housing and Community Development Amendments of 1978, 92 Stat. 2103. § 324, 42 U.S.C. § 3535(o)(1) (all future rules and regulations of the Department of Housing and Urban Development); Federal Election Campaign Act Amendments of 1974, § 315, 86 Stat. 16, as amended and redesignated, Federal Election Campaign Act Amendments of 1976, §§ 105, 110(b), 90 Stat. 475, 2 U.S.C. § 438(c); Federal Trade Commission Improvements Act of 1980, P.L. 96–252, 94 Stat. 374, 393, § 21, 15 U.S.C. § 57a–1 (any final rule of FTC subject to disapproval by concurrent resolution); Presidential Recordings and Materials Preservation Act, 88 Stat. 1695 (1974), § 104(b), 44 U.S.C. § 2107 note; Pension Reform Act, 88 Stat. 829 (1974), § 3032(d), 29 U.S.C. § 1232(d).

[2.6] A bill providing for this failed to receive the two-thirds vote required to pass under suspension of the rules by only three votes in the 94th Congress. H.R. 12048, 94th Congress, 2d sess. See H. Rept. No. 94–1014, 94th Congress, 2d sess. (1976), and 122 Cong. Rec. 31615–641, 31668. Considered extensively in the 95th and 96th Congresses, similar bills have not yet been adopted. See *Regulatory Reform and Congressional Review of Agency Rules*, Hearings before the Subcommittee on Rules of the House of the House Rules Committee, 96th Congress, 1st sess. (1979); *Regulatory Reform Legislation*, Hearings before the Senate Committee on Governmental Affairs, 96th Congress, 1st sess. (1979).

questions have not been judicially resolved [4.5] and remain the object of executive-congressional controversy.[5.5]

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[4.5] The Supreme Court has declined to consider the question on several occasions. Its decision on other points made reaching the veto question unnecessary in *Buckley* v. *Valeo*, 424 U.S. 1, 140 n. 176 (1976), although Justice White argued for the constitutionality of the device. Id., 257, 282–286 (concurring in part and dissenting in part). The summary affirmance of *Pressler* v. *Simon*, 428 F. Supp. 302 (D.C.D.C. 1976), *aff'd* 434 U.S. 1028 (1978), upholding the Federal Pay Comparability Act including a veto, was on the merits but as noted in Justice Rehnquist's concurrence could have been based on a conclusion that plaintiffs lacked standing. See also *Atkins* v. *United States*, 556 F. 2d 1028 (Ct. Cl. 1977), *cert. den.* 434 U.S. 1009 (1978) (lower court, 4-to-3, sustained Federal Salary Act congressional veto provision); *Clark* v. *Valeo*, 559 F. 2d 642 (C.A.D.C.) (*en banc*), *aff'd.*, 431 U.S. 950 (1977) (question not ripe because veto not used); *McCorkle* v. *United States*, 559 F. 2d 1258 (C.A. 4, 1977), *cert. den.* 434 U.S. 1011 (1978) (veto question not decided because not severable from entire statute, so that ruling could not help plaintiffs).

[5.5] President Carter is the most recent President to challenge the veto device as one threatening "to upset the constitutional balance of government of the United States" and representing "a fundamental departure from the way the government has been administered throughout American history." He announced he would treat all such veto provisions as "report and wait" requirements and would not consider a congressional disapproval legally binding on him. H. Doc. No. 95-357, 95th Congress, 2d sess. (1978), 124 Cong. Rec. H5879 (daily ed. June 21, 1978).

## Sec. 8, Cl. 1—Power to Tax and Spend

### [P. 132, add to N. 4:]

Nor was the question of state immunity from federal taxation much clarified in *Massachusetts* v. *United States*, 435 U.S. 444 (1978), in which a majority agreed that a nondiscriminatory user fee, a registration tax on all civil aircraft, applied to a helicopter used exclusively for police functions, could be constitutionally applied to a State. Id., 460–463, 470–471. A plurality of four extensively reviewed the immunity cases seeking to extract a governing principle. Id., 454–460.

### [P. 140, add to N. 21:]

On the spending power and congressional discretion, see *Buckley* v. *Valeo*, 424 U.S. 1, 90–92 (1976), and *Fullilove* v. *Klutznick*. 448 U.S. 448, 473–475 (1980).

### [P. 140, add to N. 25:]

In *National League of Cities* v. *Usery*, 426 U.S. 833, 852 n. 17 (1976), the Court reserved discussion of whether its commerce clause ruling might be extended to spending clause exercises of the power "to affect integral operations of state governments . . ." To date, the lower courts have rejected challenges on this basis. E.g., *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (D.C.E.D.N.C. 1977), *aff'd. per curiam*, 435 U.S. 962 (1978); *New Hampshire Dept. of Employment Security* v. *Marshall*, 616 F. 2d 240 (C.A. 1, 1980).

## Sec. 8, Cl. 3—Regulation of Commerce

**[P. 145, add to end of paragraph in text:]**

*National League of Cities* v. *Usery* [1.5] may portend a modest resurrection of judicial limitations upon congressional exercise of the commerce power with its holding that the power does not extend to the regulation of traditional governmental activities of state governments. But despite the broad phrasing of the opinion, its accommodation of cases in which Congress has been permitted to regulate and Justice Blackmun's limited concurrence suggest that the potential of the case may be quite restrained.

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[1.5] 426 U.S. 833 (1976). An opportunity to elucidate the constitutional constraints upon congressional power was lost when in *EPA* v. *Brown*, 431 U.S. 99 (1977), the Government withdrew regulations imposing certain obligations upon the States under the Clean Air Act. That the Court has no consistent theme in this area is evident in the cases applying the meaning of *Parker* v. *Brown*, 317 U.S. 341 (1943), to various state and state-sponsored anticompetitive activities. See *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976); *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977); *City of LaFayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1979); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum*, 445 U.S. 97 (1980).

**[P. 146, add to N. 2:]**

See also *McLain* v. *Real Estate Bd.*, 444 U.S. 232, 241–243 (1980); *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738 (1976); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 783–785 (1975). Congress must, of course, intend to legislate to the fullest extent possible under the commerce clause. *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974); *United States* v. *American Building Maintenance Industries*, 422 U.S. 271 (1975).

**[P. 150, add to N. 20:]**

The most recent dicta appears in *Japan Line* v. *County of Los Angeles*, 441 U.S. 434, 448–451 (1979), approving a more potent foreign commerce power than an interstate commerce power. In context, the permissibility of state taxation of foreign commerce as contrasted to taxation of interstate commerce, the distinction seems unexceptionable, but the Court's language extends beyond context.

**[P. 189, add to N. 13:]**

For recent examples, see *Lewis* v. *United States*, 445 U.S. 55 (1980); *Scarborough* v. *United States*, 431 U.S. 563 (1977); *Barrett* v. *United States*, 423 U.S. 212 (1976).

## The Commerce Clause as a Restraint on State Power

**[P. 194, add to N. 3:]**

For a recent opinion stressing the Court's hesitancy to impose uniformity on state taxation, as well as other regulations, of interstate commerce and Congress' greater expertise to legislate under the commerce clause, see *Moorman*

*Mfg. Co.* v. *Bair*, 437 U.S. 267, 280 (1978). For invalidation of a particular state tax under a quite narrow congressional enactment, rather than consideration of it under commerce clause principles, see *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141 (1979).

**[P. 194, following N. 3 in text, add new paragraph:]**

In a case of first impression, the Court held unaffected by the commerce clause, "the kind of action with which the Commerce Clause is not concerned," a Maryland bounty scheme by which the State paid scrap processors for each "hulk" automobile (one over eight years old and inoperable) destroyed. As first enacted, the bounty plan did not distinguish between in-state and out-of-state processors, but it was subsequently amended to operate in such a manner that out-of-state processors were substantially disadvantaged and received far fewer hulks after amendment of the law. The Court held that where a State enters into the market itself as a purchaser, in effect, of a potential article of interstate commerce, it does not in creating a burden upon that commerce by restricting its trade to its own citizens or businesses within the State violate the commerce clause.[1.5]

In another context, the Court rejected a two-tiered concept of "commerce," one permitting a sweeping definition when the issue is the validity of some federal action and a much more confined meaning when the validity of state legislation is called into question. "All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset."[2.5] Thus, a state ban on the importation of liquid or solid wastes for disposal within the State was subject to review. "Just as Congress has power to regulate the interstate movement of these wastes, States are not free from constitutional scrutiny when they restrict that movement."[3.5]

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[1.5] *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976). In *Reeves, Inc.* v. *Stake*, 447 U.S. 429 (1980), a five-to-four decision, *Hughes* was reaffirmed and extended somewhat when a state agency owning and operating a cement producing plant was held unencumbered by the commerce clause in confining, in times of shortage, sales of cement produced at the plant solely to state residents.

[2.5] *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 622 (1978).

[3.5] Id., 622–623.

**[P. 199, add to N. 14:]**

See *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974), expanding *Dahnke-Walker*.

**[P. 200, add to N. 23:]**

See also *United Air Lines* v. *Mahin*, 410 U.S. 623 (1973).

**[P. 209, add at conclusion of N. 15:]**

For the effect of § 381 in the context of liquor taxation, see *Heublein* v. *South Carolina Tax Comm.*, 409 U.S. 275 (1972).

In *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977), the Court sustained the imposition of a duty to collect and pay a use tax on the mail order sale of merchandise to California residents from the Society's offices in Maryland and the District of Columbia. The Society's activities in California consisted solely of the maintenance of two offices that solicited advertising copy for its monthly magazine; these offices performed no functions related to the mail order sales of maps, atlases, globes, and books upon which the use tax was imposed. The continuous presence of the two offices provided a sufficient nexus to justify the imposition of a duty to collect the use tax, the Court held. *Bellas Hess* was distinguished as involving a direct tax so that there must exist a nexus or relationship not only between the seller and the taxing State but also between the activity of the seller sought to be taxed and the seller's activity within the State; where there was a lesser burden, such as that of merely collecting a use tax on goods sold within the taxing State, the lesser nexus of the existence of the two offices in the State was constitutionally sufficient. Id., 559-561. *Miller Bros* was also distinguished by the Court, id., 558-559, 561-562, but Justice Blackmun thought the distinction unpersuasive and that the former case was undermined. Id., 562.

### [P. 222, add to N. 5:]

Followed in *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100 (1975).

### [P. 224, add to N. 12:]

See also *Evco v. Jones*, 409 U.S. 91 (1972).

### [P. 226, add to N. 3:]

These two cases were overruled in *Dept. of Revenue v. Washington Stevedoring Cos.*, 435 U.S. 734, 743-751 (1978).

### [P. 227, in text following N. 10, add:]

The Court has now clearly opted for a standard of review that emphasizes the practical economic effects of the challenged tax.[1.5] No longer will it operate, as some lines of cases have been structured, on the principle that interstate commerce is immune from state taxation. So long as state taxes are applied to an activity with a sufficient nexus with the taxing state, are fairly apportioned, do not discriminate against interstate commerce, and are reasonably related to the services

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[1.5] *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100 (1975); *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977); *Dept. of Revenue v. Washington Stevedoring Cos.*, 435 U.S. 734 (1978); *Mobil Oil Corp. v. Comr. of Taxes*, 445 U.S. 425, 443 (1980); *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207, 227-228 (1980).

provided by the State, they will be sustained.[2.5] The fact of what a tax is called, as in the principal case a tax on the "privilege of doing business" in the State, is constitutionally irrelevant.[3.5]

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[2.5] *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, 447 U.S. 207, 227–228 (1980) (citing cases). When the tax is levied on foreign commerce rather than interstate commerce, two additional considerations come into play, the danger of multiple taxation about which the courts can do nothing and the danger that the necessary federal uniformity in foreign relations will be impaired. A tax that passes the four-part test with respect to interstate commerce can, and in *Japan Line* v. *County of Las Angeles*, 441 U.S. 434 (1979), did, fail to pass the additional two-part test. For an extensive treatment of apportionment standards, see *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267 (1978). In *Exxon Corp.* v. *Wisconsin Dept. of Revenue*, *supra*, and *Mobil Oil Corp.* v. *Comr. of Taxes*, 445 U.S. 425 (1980), the Court approved an apportionment formulae that took into account all of the corporations' income from within and without the State. For a case of discrimination against interstate commerce, see *Boston Stock Exchange* v. *State Tax Comm.*, 429 U.S. 318 (1977).

[3.5] *Complete Auto Transit* v. *Brady*, 430 U.S. 274 (1977), overruling *Spector Motor Service* v. *O'Connor*, 340 U.S. 602 (1951).

**[P. 229, add to N. 21:]**

*Spector* was overruled in *Complete Auto Transit* v. *Brady*, 430 U.S. 274 (1977).

**[P. 237, add to N. 11:]**

For a recent limitation upon the scope of state quarantine laws, see *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978).

**[P. 238, add to N. 1:]**

For a modern statement of applicable principles, see *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 623–624 (1978); *Raymond Motor Transp.* v. *Rice*, 434 U.S. 429, 440–442 (1978).

**[P. 250, in text following N. 12, add new paragraph:]**

In *Raymond Motor Transp.* v. *Rice*,[1.5] the Court arguably stiffened the scrutiny with which it would review state regulation of interstate carriers purportedly for safety reasons. Determining whether regulation has a permissible or an impermissible impact upon interstate commerce calls for an "inquiry that necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." This balancing approach is not different when the State claims a safety purpose. There must be "a weighing of the asserted safety purpose against the degree of interference with interstate commerce."

"Nevertheless, it also is true that the Court has been most reluctant to invalidate under the Commerce Clause ' "state legislation in

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[1.5] 434 U.S. 429 (1978).

the field of safety where the propriety of local regulation has long been recognized." '... In no field has this deference to state regulation been greater than that of highway safety regulation.... Thus, those who would challenge state regulations said to promote highway safety must overcome a 'strong presumption of [their] validity.' "[2.5] However, the Court's actual conclusion of invalidity was based on the twin findings that the regulations "place a substantial burden on interstate commerce and they cannot be said to make more than the most speculative contribution to highway safety."[3.5] For this reason and because four of the eight participating Justices noted an understanding somewhat at variance with the opinion of the Court, assessment of the meaning of the decision is difficult.

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[2.5] Id., 441, 443–444.

[3.5] Id., 447. Concurring, Justice Blackmun observed that "the Court does not engage in a balance of policies; ... Instead, ... it concludes that the safety interests have not been shown to exist as a matter of law." Id., 448, 450.

**[P. 250, add to N. 15:]**

A modern application of *Gibbons* v. *Ogden* is *Douglas* v. *Seacoast Products*, 431 U.S. 265 (1977), in which the Court, in reliance on the present version of the licensing statute utilized by Chief Justice Marshall, struck down state laws curtailing the operations of federally licensed vessels. In the course of the *Douglas* opinion, the Court observed that "[a]lthough it is true that the court's view in *Gibbons* of the intent of the Second Congress in passing the Enrollment and Licensing Act is considered incorrect by commentators, its provisions have been repeatedly re-enacted in substantially the same form. We can safely assume that Congress was aware of the holding, as well as the criticism, of a case so renowned as *Gibbons*. We have no doubt that Congress has ratified the statutory interpretation of *Gibbons* and its progeny." Id., 278–279.

**[P. 251, add to N. 17:]**

A modern echo of *Cooley* is *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 179–180 (1978), in which the Court, *inter alia*, sustained a state requirement that vessels not satisfying certain design requirements be escorted by tugboats in Puget Sound. Noting the requirement's similarity "to a local pilotage requirement," the Court, following *Cooley*, pronounced it "not the type of regulation that demands a uniform national rule." But in an apparent departure from *Cooley*, the Court also observed that it did not appear that "the requirement impedes the free and efficient flow of interstate and foreign commerce ..."

**[P. 257, in text following N. 18, insert:]**

A nearly unanimous Court held, in a case where an out-of-state merchant contracted with farmers within a State to deliver their future cotton crops to warehouses within the State for reshipment, as needed, in interstate sales, the merchant was doing an interstate business and the State could not, consistent with the commerce clause, deny him access to state courts on the basis that he had not qualified under applicable state statutes to transact business within the State.[1.5]

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[1.5] *Allenberg Cotton Co.* v. *Pittman*, 419 U.S. 20 (1974).

**[P. 260, in text following N. 15, add:]**

Striking down a state statute that forbade the importation of most solid or liquid waste into the State for disposal in landfills, while the State permitted the continued disposal of domestic wastes in those landfills, the Court distinguished previous cases that had upheld quarantine measures directed at interstate commerce. Those quarantine laws, the Court said "banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin." The movement of the wastes into the State occasioned no risk to health; rather, the harms arose after its disposal in landfills and at that point there was no basis to distinguish out-of-state waste from domestic waste.[1.5]

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[1.5] *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 628–629 (1978).

**[P. 261, add to N. 24:]**

See also *Great Atlantic and Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976).

**[P. 261, add to N. 25:]**

Overruled by *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979).

**[P. 263, add to N. 13:]**

In *Great Atlantic and Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976), the Court held unjustified by any legitimate state interest and therefore invalid a state regulation providing that milk and milk products from another State could be sold in the State only if the other State accepted milk or milk products produced and processed in the first State on a reciprocal basis. The milk sought to be imported satisfied the first State's quality standards but the two States had not signed a reciprocity agreement.

**[P. 264, in text following N. 19, add:]**

Overruling *Geer*, the Court announced that henceforth it would review commerce clause challenges to state regulations of wild animals under the same standards it applies to state regulations of other natural resources.[1.5] Rejected as a legitimate purpose was a claim of conservation since a prohibition of interstate transportation of minnows caught in state waters with no limitation on in-state use ill served conservation and to the extent it did so, struck directly at interstate commerce. The Court observed that it would continue to respect legitimate state concerns for conservation and protection of wild animals.

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[1.5] *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979). Compare the negative discussion of *Geer* in *Douglas* v. *Seacoast Products*, 431 U.S. 265, 284–285 (1977), with the positive discussion in *Baldwin* v. *Montana Fish and Game Comm.*, 436 U.S. 371, 384–387 (1978).

**[P. 264, following paragraph with N. 20, add:]**

The present approach of the Court to state regulations that impact upon interstate commerce is well illustrated in several cases following the *Pike* v. *Bruce Church* case. If regulation burdens interstate commerce but applies evenhandedly, it will be upheld unless the interference with interstate commerce is "clearly excessive" when balanced against the State's regulatory interest.[1.5] But when the state regulation discriminates against interstate commerce, the State in order to save the regulation from invalidation must demonstrate that legitimate local purposes are served by the regulation and that these purposes cannot be served by alternative means that are less discriminatory in effect.[2.5] Facially neutral regulations may, when examined, be found to work a "practical discrimination" against interstate commerce and thus subject to heightened scrutiny.[3.5]

In *Exxon Corp.* v. *Governor of Maryland*,[4.5] a state law prohibiting integrated oil companies from owning retail gasoline stations within the State was sustained against charges of intentional discrimination against interstate commerce and of impermissible burdening of such commerce. First, while the statute itself made no distinction between in-state and out-of-state firms, it was the fact that no integrated oil companies were based in Maryland and thus the only companies affected by the statute were out-of-state firms. But not all out-of-state companies were affected; some companies operating in interstate commerce and retailing gasoline in Maryland were not integrated oil companies and could continue to operate as before. Although the burden of the law fell on *some* interstate companies, that fact alone, in the absence of the giving to in-state dealers a competitive advantage over out-of-state dealers, did not demonstrate discrimination against interstate commerce. Second, the law was held not to be an impermissible burden on interstate commerce, although it assuredly would shift

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[1.5] *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Great Atlantic and Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 371–372 (1976); *Raymond Motor Transp.* v. *Rice*, 434 U.S. 429, 440–442 (1978); *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979); *Lewis* v. *BT Investment Mgrs.*, 447 U.S. 27, 36–37 (1980).

[2.5] *Hunt* v. *Washington State Apple Advertising Comm.*, 432 U.S. 333, 353 (1977).

[3.5] Id., 350.

[4.5] 437 U.S. 117, 125–129 (1978). Compare *Lewis* v. *BT Investment Mgrs.*, 447 U.S. 27 (1980) (statutory bar to banks, bank holding companies, and trust companies with principal operations outside State to engage in certain activities is discrimination among affected business entities according to the extent of contacts with local economy and is distinguishable from *Exxon*).

some interstate business from some concerns to others and change the market structure in existence. The commerce clause does not protect particular firms nor particular structures or methods; it is the interstate market as a whole and only commerce as such that is protected.

In another case, the facial neutrality of a state law was found to impermissibly—and perhaps intentionally—burden interstate commerce. A North Carolina statute required that all closed containers of apples shipped into or sold in the State bear the applicable United States grade or none at all; Washington State has a stringent grading system that is equivalent to or superior to the federal standards. Balancing the state interest in consumer protection against the burden imposed on interstate commerce, the Court failed to discern a sufficient state interest that permitted the imposition of increased costs of doing business on Washington producers, who would have to alter marketing practices to comply whereas North Carolina producers would not, and the removal of the market advantage Washington apples would have with the state grading marks displayed over ungraded domestic apples.[5.5]

On the other hand, balancing, such as that in the previous case, is not utilized by the Court when the means adopted by the State, even for legitimate purposes, are discriminatory. Thus, without resolving the question of the purpose of a New Jersey law banning the importation of liquid or solid wastes for disposal at landfills in the State, the Court found *per se* invalid any such resort to "protectionism", whether of means or ends. No matter its purpose, "it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."[6.5]

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[5.5] *Hunt* v. *Washington State Apple Advertising Comm.*, 432 U.S. 333 (1977). The Court noticed but did not rely on evidence that the law was designed to protect domestic apple growers. Id., 352. Basis for the decision was the Court's finding that the statute did "remarkably little" in furthering the goal of consumer protection, id., 353, and nondiscriminatory alternatives existed to further the goal. Id., 354.

[6.5] *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 626–627 (1978). The case is the first to strike down as "protectionist" state legislation not designed to further an impermissible economic goal, such as the sheltering of domestic commerce from competition. See cases cited at id., 627. "[T]he evil of protectionism can reside in legislative means as well as legislative ends." Id., 626.

## Concurrent Federal-State Jurisdiction: Preemption

**[P. 277, add to text following N. 8:]**

The Court has reaffirmed that it will find preemption of state law only where Congress has either explicitly or implicitly declared that the States are prohibited from acting in the same area as the federal law or where, in the absence of such congressional intent, a state statute actually conflicts with a valid federal statute.[1.5] While the expression of the standards has not changed, application of them to specific cases indicates some reluctance to find the exercise of state powers preempted. Thus, a state liability scheme imposing cleanup costs and strict, no-fault liability on shore facilities and ships for any oil-spill damage was held to complement a federal law concerned solely with recovery of actual cleanup costs incurred by the Federal Government and which textually presupposed federal-state cooperation.[2.5] On the other hand, a comprehensive regulation of the design, size, and movement of oil tankers in Puget Sound was found, save in one respect, to be either expressly or implicitly preempted by federal law and regulations issued thereunder. Critical to the determination was the Court's finding that Congress, without actually saying so, had intended to mandate exclusive standards and a single federal decisionmaker for safety purposes in vessel regulation and that the State could not impose higher standards.[3.5] Also, a closely divided Court voided a city ordinance placing an 11 p.m. to 7 a.m. curfew on jet flights from the city airport where, despite the absence of preemptive language in federal law, federal regulation of aircraft noise was of such a pervasive nature as to leave no room for state or local regulation.[4.5] Much more speculative was the Court's voiding of a state requirement that the average net weight of a package of flour in a lot could not be less than the net weight stated on the package. While applicable federal provisions permitted variations from stated weight caused by distribution losses, such as through partial dehydration, the State allowed no such deviation. It was thus possible for the producer to satisfy the federal regulation but fall short of the state requirement. Although it was possible for a producer to satisfy both the federal and the state regulation, the Court found the federal law implicitly preempted the state law, because the latter "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." One of the purposes of the federal requirement was the facilitating of value comparisons by shoppers; because different producers in different situations in order to comply with the state standard may have to overpack flour to make up for dehydration loss, consumers who attempt to com-

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[1.5] *Jones v. Rath Packing Co.*, 430 U.S. 519, 525–526 (1977) : *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157–158 (1978).

[2.5] *Askew v. American Waterways Operators*, 411 U.S. 325 (1973). In the context of other federal powers, see *Goldstein v. California*, 412 U.S. 546 (1973) ; *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) ; *De Canas v. Bica*, 424 U.S. 351 (1976).

[3.5] *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

[4.5] *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

pare different packages would not be comparing packages which contained identical amounts of flour solids.[5.5]

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[5.5] *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 532–543 (1977). The quoted phrase is from *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). In another element of the case, the Court was unanimous in striking down an identical state requirement applied to bacon as expressly preempted by federal law. Id., 430 U.S., 528–532.

## Federal Versus State Labor Laws

**[P. 277, add to N. 10:]**

Overruled in *Machinists & Aerospace Workers* v. *WERC*, 427 U.S. 132 (1976).

**[P. 278, add to N. 14:]**

In *Oil, Chemical & Atomic Workers Union* v. *Mobil Oil Corp.*, 426 U.S. 407 (1976), the Court held that the predominant job situs of employees determines the applicability of state right-to-work laws and that the Texas law did not apply to seamen performing most of their work outside the State on the high seas, even though the seamen were hired in Texas, most resided in Texas, and the company's personnel records were maintained in Texas. And in *Beasley* v. *Food Fair*, 416 U.S. 653 (1974), it was held that a provision of federal law stating that no employer was to be compelled to treat supervisors as employees for purposes of any national or state law precluded suit under a state right-to-work law creating a right to damages for employees discharged for union membership when the discharged employees were supervisors.

**[P. 279, add to N. 22:]**

State jurisdiction is preempted, of course, only if the labor dispute occurs "in commerce" within the meaning of federal law. E.g., *Windward Shipping* v. *American Radio Assn.*, 415 U.S. 104 (1974); *American Radio Assn.* v. *Mobile Steamship Assn.*, 419 U.S. 215 (1974) (state courts have jurisdiction to enjoin picketing of foreign flag vessels inasmuch as NLRB has no authority over such disputes).

**[P. 279, add to N. 24:]**

See *Machinists & Aerospace Workers* v. *WERC*, 427 U.S. 132, 136–137 nn. 2–3 (1976).

**[P. 280, add to first full paragraph on page:]**

But in *Letter Carriers* v. *Austin*,[5.6] the Court held that federal law preempts state defamation laws in the context of labor disputes to the

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[5.6] 418 U.S. 264 (1974). Federal law in this instance was a presidential Executive Order governing labor-management relations in the federal executive branch. The labor dispute at issue was an effort by the union to persuade nonmember carriers to join; the rule is expressly made applicable to "any publication made during the course of union organizing efforts, which is arguably relevant to that organizational activity." Id., 279. Henceforth, only those defamations within the meaning of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), may be made actionable when they occur in the context of a labor dispute.

extent that the State seeks to make actionable defamatory statements in labor disputes published without knowledge of their falsity or in reckless disregard of truth or falsity.

However, a state tort action for the intentional infliction of emotional distress occasioned through an alleged campaign of personal abuse and harassment of a member of the union by the union and its officials was held not preempted by federal labor law. Federal law was not directed to the "outrageous conduct" alleged and NLRB resolution of the dispute would neither touch upon the claim of emotional distress and physical injury nor award the plaintiff any compensation. But state court jurisdiction, in order that there not be interference with the federal scheme, must be premised on tortious conduct either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.[2.5]

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[2.5] *Farmer* v. *Carpenters*, 430 U.S. 290 (1977).

**[P. 280, add to N. 8:]**

See also *William E. Arnold Co.* v. *Carpenters' District Council*, 417 U.S. 12 (1974).

**[P. 280, add to N. 9:]**

This element of the preemption doctrine was reaffirmed in *Machinists & Aerospace Workers* v. *WERC*, 427 U.S. 132 (1976), in which the Court held that because Congress had intended the self-help economic activities of employers and employees—here the concerted refusal of employees to work overtime in order to put bargaining pressure on the employer—to be free of regulation, the state commission did not have the jurisdiction to find the practice unfair and to order it halted. In *New York Telephone Co.* v. *New York State Dept. of Labor*, 440 U.S. 519 (1979), while all the Justices accepted the principle that some economic weapons of employers and labor left free by Congress could not be regulated by the States, no majority could be assembled on the standards by which to determine permissible and impermissible state regulations when the Court held that a state decision to pay unemployment compensation to strikers was not an interference with the federal regulations.

**[P. 281 following N. 11 in text, add new paragraph:]**

A significant retrenchment of *Garmon* occurred in *Sears, Roebuck & Co.* v. *Carpenters*,[1.5] in the context of state court assertion of jurisdiction over trespassory picketing. Objecting to the company's use of nonunion work in one of its departments, the union picketed the store, using the company's property, the lot area surrounding the store,

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[1.5] 436 U.S. 180 (1978). The opinion was by Justice Stevens; Justices Brennan, Stewart, and Marshall dissented. Id., 214. For discussions of the development of the preemption doctrine, see id., 187–197 (opinion of the Court), and 217–224 (Justice Brennan dissenting). See also *Farmer* v. *Carpenters*, 430 U.S. 290, 295–301 (1977).

instead of the public sidewalks to walk on. After the union refused to move its pickets to the sidewalk the company sought and obtained a state court order enjoining the picketing on company property. Depending upon the union motivation for the picketing, it was either arguably prohibited or arguably protected by federal law, the trespassery nature of the picketing being one factor the NLRB would have looked to in determining at least the protected nature of the conduct. The Court held, however, that under the circumstances, neither the arguably prohibited nor the arguably protected rationale of *Garmon* was sufficient to deprive the state court of jurisdiction.

First, as to conduct arguably prohibited by NLRA, the Court seemingly expanded the *Garmon* exception recognizing state court jurisdiction for conduct that touches interests "deeply rooted in local feeling"[2.5] in holding that where there exists "a significant state interest in protecting the citizens from the challenged conduct" and there exists "little risk of interference with the regulatory jurisdiction" of the NLRB, state law is not preempted. Here, there was obviously a significant state interest in protecting the company from trespass; the second, "critical inquiry" was whether the controversy presented to the state court was identical to or different from that which could have been presented to the Board. The Court concluded that the controversy was different. The Board would have been presented with determining the motivation of the picketing and the location of the picketing would have been irrelevant; the motivation was irrelevant to the state court and the situs of the picketing was the sole inquiry. Thus, there was deemed to be no realistic risk of state interference with Board jurisdiction.[3.5]

Second, in determining whether the picketing was protected, the Board would have been concerned with the situs of the picketing, since under federal labor laws the employer has no absolute right to prohibit union activity on his property. Preemption of state court jurisdiction was denied, nonetheless, in this case on two joined bases. One, preemption is not required in those cases in which the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so. In this case, the union could have filed with the Board when the company demanded removal of the pickets, but did not, and the company could not file with the Board at all. Two, even if the matter is not presented to the Board, preemption is called for if there is a risk of erroneous state court adjudication of the protection issue that is unacceptable, so that one must look to the strength of the argument that the activity is protected. While the state court had to make an initial determination that the trespass was not protected under federal law, the same determination the Board would have made, in the instance of trespassory conduct, the risk of erroneous determination is small,

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[2.5] *San Diego Bldg Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

[3.5] *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 190–198 (1978).

because experience shows that a trespass is far more likely to be unprotected than protected.[4.5]

Introduction of these two balancing tests into the *Garmon* rationale substantially complicates determining when state courts do not have jurisdiction and will no doubt occasion much more litigation in state courts than has previously existed.

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[4.5] Id., 190-207.

## Commerce with Indian Tribes

### [P. 282, add to N. 5:]

In *United States* v. *Mazurie*, 419 U.S. 544 (1975), the Court held that Congress could regulate the activities of non-Indians on non-Indian land located within the boundary of an Indian reservation in the context of barring the introduction of alcoholic beverages into Indian country; moreover, this authority could be delegated to the reservation's tribal council. The independent authority of Indian tribes over matters that affect the internal and social relations of tribal life is sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority under the commerce clause.

### [P. 282, in text following N. 8, add:]

Contrary to the discussion in the text, the Court has settled upon the commerce clause as one of the two bases of authority empowering the Federal Government to deal with the Indians. "The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."[1.5] Forsaking reliance upon other theories and rationales, the Court has established the preemption doctrine as the analytical framework within which to judge the permissibility of assertions of state jurisdiction over the Indians. Because, however, of the existence of a measure of Indian sovereignty with respect to the reservation and tribal members,[2.5] the preemption doc-

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[1.5] *McClanahan* v. *Arizona Tax Comm.*, 411 U.S. 164, 172 n. 7 (1973). See also *Morton* v. *Mancari*, 417 U.S. 535, 551-553 (1974); *United States* v. *Mazurie*, 419 U.S. 544, 553-556 (1974); *Bryan* v. *Itasca County*, 426 U.S. 373, 376 n. 2 (1976); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980). The last cited case also alludes to an "independent" and "sufficient basis" for barring the applicability of state law, that it infringes on Indian self-government. Ibid. That case and *Washington* v. *Confederated Colville Tribes*, 447 U.S. 134 (1980), appear to use a balancing test only somewhat related to the preemption doctrine. See id., 176 (Justice Rehnquist concurring and dissenting).

[2.5] See *United States* v. *Wheeler*, 435 U.S. 313 (1978). Among the fundamental attributes of sovereignty which a tribe possesses unless divested of it by federal law or necessary implication is the power to tax non-Indians entering the reservation to engage in economic activities. *Washington* v. *Confederated Colville Tribes*, 447 U.S. 134, 152-154 (1980). But see *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978) (no criminal authority over non-Indians).

trine has been modified to a degree so that vague or ambiguous federal enactments are ordinarily interpreted in the favor of Indians.[3.5] State laws must yield generally to overriding federal statutory policies in areas such as hunting and fishing rights,[4.5] but the scope of state taxing authority appears to have been the most litigated question. Absent cession of jurisdiction or other congressional consent, States possess no power to tax Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation.[5.5] Off-reservation Indian activities require an express federal exemption to deny state taxing power,[6.5] and the subjection to taxation of non-Indians doing business with Indians on the reservation involves a close analysis of the federal statutory framework.[7.5]

While the power of Congress over Indian affairs is broad, it is not limitless,[8.5] The Court has promulgated a standard of review that defers to the legislative judgment "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . ."[9.5] A more searching review is warranted where it is alleged that the Federal Government's behavior toward the Indians has been in contravention of its obligation and that it has in fact taken property from a tribe which it had heretofore guaranteed to the tribe without either compensating the tribe or otherwise giving the Indians the full value of the land.[10.5]

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[3.5] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–144 (1980).

[4.5] See *Washington Game Dept. v. Puyallup Tribe*, 414 U.S. 44 (1973); *Antoine v. Washington*, 420 U.S. 194 (1975); *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977); *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979).

[5.5] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973); *McClanahan v. Arizona Tax Comm.*, 411 U.S. 164 (1973); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Washington v. Confederated Colville Tribes*, 447 U.S. 134 (1980).

[6.5] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 158 (1973); *McClanahan* 1.

[7.5] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Central Machinery Co. v. Arizona Tax Comm.*, 448 U.S. 160 (1980).

[8.5] "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946) (plurality opinion), quoted with approval in *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84 (1977).

[9.5] *Morton v. Mancari*, 417 U.S. 535, 555 (1974). The Court applied the standard to uphold a statutory classification that favored Indians over non-Indians. But in *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977), the same standard was used to sustain a classification that disfavored, although inadvertently, one group of Indians as opposed to other groups of Indians. While Indian tribes are unconstrained by federal or state constitutional provisions, Congress has legislated a "bill of rights" provision covering them. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

[10.5] *United States v. Sioux Nation*, 448 U.S. 371 (1980).

## Sec. 8, Cl. 4—Naturalization and Citizenship

### [P. 294, add to N. 22:]

In *Vance* v. *Terrazas*, 444 U.S. 252 (1980), the entire Court seemed to accept the continuing vitality of *Afroyim* as, by a divided vote, it sustained the constitutionality of a congressionally-imposed standard of proof, preponderance of evidence, by which to determine whether one had by his actions lost his citizenship, in this case by the act of a dual national in swearing allegiance to the other country of which he was a citizen.

### [P. 295, add second paragraph to N. 1:]

The power of Congress to prescribe the rules for exclusion or expulsion of aliens is a "fundamental sovereign attribute" which is "of a political character and therefore subject only to narrow judicial review." *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 101 n. 21 (1976); *Mathews* v. *Diaz*, 426 U.S. 67, 81–82 (1976); *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977). Although aliens are "an identifiable class of persons," who aside from the classification at issue "are already subject to disadvantages not shared by the remainder of the community", *Hampton* v. *Mow Sun Wong*, *supra*, 102, Congress may treat them in ways that would violate the equal protection clause if a State should do it. *Diaz*, *supra* (residency requirement for welfare benefits); *Fiallo*, *supra* (sex and illegitimacy classifications). Nonetheless in *Mow Sun Wong*, *supra*, 103, the Court observed that when the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the equal protection clause if adopted by a State, due process requires that it be shown that the rule was actually intended to serve that interest. The case struck down a classification that the Court thought justified by the interest asserted but that had not been imposed by a body charged with effectuating that interest. See *Vergara* v. *Hampton*, 581 F. 2d 1281 (C.A. 7, 1978).

### [P. 297, add to N. 16:]

See also *DeCanas* v. *Bica*, 424 U.S. 351 (1976).

### [P. 298, add to N. 21:]

Upholding a state law that prohibits an employer from hiring aliens not entitled to lawful residence in the United States, the Court in *DeCanas* v. *Bica*, 424 U.S. 351 (1976), held that States may enact legislation touching upon aliens and that such regulation may coexist with federal laws, under regular preemption standards, unless the nature of the regulated subject matter permits no other conclusion or unless Congress has unmistakably ordained that state law may not coexist.

## Sec. 8, Cl. 8—Copyrights and Patents: State Power

### [P. 319, add new paragraph in text following N. 4:]

A significant change in Court doctrine from that prevailing in *Stiffel* and *Compco* reverses the presumption there established against the validity of state laws affecting material that comes within the scope of Congress' power, exercised or unexercised, under this clause. The two previous cases held that a State could not utilize unfair competition laws to prevent or punish the copying of products which were not entitled to a patent. Emphasizing the necessity for a uniform national policy and noticing the monopolistic effects of the state protection, the Court inferred that because Congress had not extended the patent [and copyright] laws to the material at issue, federal policy was to promote free access when the materials were thus in the public domain. But in *Goldstein* v. *California*,[1.5] the Court distinguished the prior cases[2.5] and held that the determination whether a state "tape piracy" statute conflicted with the federal copyright statute depended upon the existence of a specific congressional intent to forbid state protection of the "writing" that was there involved. Its consideration of the statute and of its legislative history convinced the Court that Congress in protecting certain "writings" and in not protecting other "writings" bespoke no intention that federally unprotected materials should enjoy no state protection, only that Congress "has left the area unattended."[3.5] In the following Term, the Court used similar analysis to sustain the application of a state trade secret law to protect a chemical process, that was patentable but not patented, from utilization by a commercial rival which had obtained the process from former employees of the company, all of whom had signed agreements not to reveal the process. The Court determined that protection of the process by state law was not incompatible with the federal patent policy of encouraging invention and public use of patented inventions, inasmuch as the trade secret law serves other interests not similarly served by the patent law and where it protects matter clearly patentable it is not likely to deter applications for patents.[4.5]

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[1.5] 412 U.S. 546 (1973). The opinion by Chief Justice Burger was joined by Justices Stewart, White, Powell, and Rehnquist. Justices Douglas, Brennan, Marshall, and Blackmun dissented. Id., 572, 576.

[2.5] "Congress had balanced the need to encourage innovation and originality of invention against the need to insure competition in the sale of identical or substantially identical products. The standards established for granting federal patent protection to machines thus indicated not only which articles in this particular category Congress wished to protect, but which configurations it wished to remain free." Id., 560.

[3.5] Id., 570. Basic to the decisions is the principle that the States are not precluded by the copyrights and patent clause from legislating at all in the field. The clause does not confer on Congress exclusive power nor deny any power to the States. Neither is it necessarily the case that the exercise of state authority will always be repugnant to the federal scheme. Therefore, despite previous intimations, *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 228–231 (1964), the States do have areas of interest about which they may legislate. *Goldstein* v. *California*, 412 U.S. 546, 552–560 (1973).

[4.5] *Kewanee Oil Co.* v. *Bicron Corp.*, 416 U.S. 470 (1974). Justice Marshall concurred on the basis that while aware of the trade secrets issue Congress had never disapproved its application in the patent area, id., 493, while Justices Douglas and Brennan dissented. Id., 495. See also *Aronson* v. *Quick Point Pencil Co.*, 440 U.S. 257 (1979).

## Sec. 8, Cls. 11-16—War Power

### [P. 328, add to N. 21:]

In *Atlee* v. *Richardson*, 411 U.S. 911 (1973), *aff'g*, 347 F. Supp. 689 (D.C.E.D. Pa. 1972), the Court summarily affirmed a three-judge court's dismissal of a suit challenging the constitutionality of United States activities in Vietnam on political question grounds. The action constituted an apparent holding on the merits that such war powers issues are political questions. In another case, Justice Marshall refused to vacate a stay of an appeals court holding in abeyance a district court injunction prohibiting United States military action in Cambodia. Justice Douglas thereupon vacated the stay, and Justice Marshall with the concurrence of the other Justices imposed a new stay. *Holtzman* v. *Schlesinger*, 414 U.S. 1304, 1316, 1321 (1973).

### [P. 328, add to N. 22:]

See also *Holtzman* v. *Schlesinger*, 484 F. 2d 1307 (C. A. 2, 1973), *cert. den.*, 416 U.S. 936 (1974); *Mitchell* v. *Laird*, 488 F. 2d 611 (C.A.D.C. 1973).

### [P. 329, add to N. 23:]

Congress did in 1973 set an August 17, 1973, cutoff date for United States military activities in Indochina. P.L. 93-52, § 108, 87 Stat. 134. Subsequently, over the President's veto, Congress enacted the War Powers Resolution, designed to curb the President's powers to use military forces in the absence of congressional action. P.L. 93-148, 87 Stat. 555 (1973), 50 U.S.C. 1541-1548.

## The Power To Raise and Maintain Armed Forces

### [P. 332, following N. 21 in text, add new paragraph:]

Emphasizing the unique, separate status of the military, the necessity to indoctrinate men in obedience and discipline, the tradition of military neutrality in political affairs, and the need to protect troop morale, the Court, in *Greer* v. *Spock*,[1.5] sustained military post regulations, backed by congressional enactments, banning speeches and demonstrations of a partisan political nature and the distribution of literature without prior approval of post headquarters with the commander authorized to keep out only those materials that would clearly endanger the loyalty, discipline, or morale of troops on the base. The undergirding themes of the opinion of the Court and of the concurrences bespeak a general judicial "hands-off" policy with respect to military institutions, a policy that the Court had recently departed

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[1.5] 424 U.S. 828 (1976), limiting *Flower* v. *United States*, 407 U.S. 197 (1972).

from.[2.5] Applying the same principles, the Court sustained against constitutional and statutory challenges, military regulations requiring servicemen to obtain approval from their commanders before circulating petitions on base, in the context of circulations of petitions for presentation to Congress.[3.5]

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[2.5] The basic theme is enunciated in *Parker* v. *Levy*, 417 U.S. 733, 743–752 (1974). Thus, the Court recognizes "that the military is, by necessity, a specialized society separate from civilian society", id., 743 that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian", id., 744, quoting *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953), and that "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed than it is when prescribing rules for [civilian society]." Id., 756. See also *Schlesinger* v. *Councilman*, 420 U.S. 738, 746–748 (1975); *Greer* v. *Spock*, 424 U.S. 828, 837–838 (1976); *Middendorf* v. *Henry*, 425 U.S. 38, 45–46 (1976); *Brown* v. *Glines*, 444 U.S. 348, 353–358 (1980). The Court's attitude obviously has great potential with respect to many areas of litigation on servicemen's rights, E.g., *Carlson* v. *Schlesinger*, 511 F. 2d 1327 (C.A.D.C. 1975) (speech); *Committee for GI Rights* v. *Callaway*, 518 F. 2d 466 (C.A.D.C. 1975) (Fourth Amendment and Army drug abuse program), as well as the continuing vitality of *O'Callagan* v. *Parker*, 395 U.S. 258 (1969) (see *text, pp. 332–334*).

[3.5] *Brown* v. *Glines*, 444 U.S. 348 (1980); *Secretary of the Navy* v. *Huff*, 444 U.S. 453 (1980). The statutory challenge was based on 10 U.S.C. § 1034 which protects a serviceman's right to communicate with a Member of Congress and which the Court narrowly interpreted.

## Trial and Punishment of Offenses

### [P. 333, add to N. 5:]

In *Gosa* v. *Mayden*, 413 U.S. 665 (1973), a fractionated Court held that *O'Callahan* should be denied retroactive application. In the course of the opinions, Justice Rehnquist urged the overruling of *O'Callahan*, id. 692, as did Justice Stewart, id., 693 while three Justices in dicta indicated that any offense committed during wartime should be deemed "service-connected." Id., 686, 692, 693 (Justices Douglas, Rehnquist, and Stewart).

### [P. 333, add to N. 6:]

The issue was left unresolved in *Middendorf* v. *Henry*, 425 U.S. 25 (1976), in which the Court held that a summary court martial, for the trial of relatively minor offenses in which maximum confinement is 30 days at hard labor or 45 days at hard labor without confinement, is not a "criminal prosecution" within the meaning of the Sixth Amendment and further held that the due process clause does not mandate counsel in such proceedings because on balance the interests of the accused are outweighed by the military interests involved. Justices Stewart, Brennan, and Marshall dissented. Id., 48, 51.

### [P. 333, add to N. 8:]

This conclusion of the Court of Military Appeals is at least questioned and perhaps implicitly disapproved in *Middendorf* v. *Henry*, 425 U.S. 25, 42–48 (1976). In any event, the conclusion of the CMA that counsel was required in summary court martial was collaterally overturned.

**[P. 333, add new paragraph following last paragraph on page:]**

Upholding Articles 133 and 134 of the Uniform Code of Military Justice, the Court stressed the special status of military society.[1.5] This difference has resulted in a military Code that regulates aspects of the conduct of members of the military which in the civilian sphere would go unregulated, but on the other hand the penalties imposed range from the severe to well below the threshold of that possible in civilian life. Because of these factors, the Court, while agreeing that constitutional limitations applied to military justice, was of the view that the standards of constitutional guarantees were significantly different in the military than in civilian life. Thus, the vagueness challenge to the Articles was held to be governed by the standard applied to criminal statutes regulating economic affairs, the most lenient of vagueness standards.[2.5] Neither did application of the Articles to conduct essentially composed of speech necessitate a voiding of the conviction, inasmuch as the speech was unprotected and even while it might reach protected speech the officer here was unable to raise that issue.[3.5]

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[1.5] *Parker* v. *Levy*, 417 U.S. 733 (1974). Article 133 punishes a commissioned officer for "conduct unbecoming an officer and gentleman", and Article 134 punishes any person subject to the Code for "all disorders and neglects to the prejudice of good order and discipline in the armed forces". Justices Douglas, Stewart, and Brennan dissented, id., 766, 773 and Justice Marshall did not participate.

[2.5] Id., 756.

[3.5] Id., 757–761. "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission require a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." Id., 758.

**[P. 334, add to N. 19:]**

In *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), the Court adhered to the rule allowing collateral attack on the judgments of military courts and held that, while federal courts have jurisdiction to intervene in military court proceedings prior to judgment, as a matter of equity, following the standards applicable to federal court intervention in state criminal proceedings, they should act, when the petitioner has not exhausted his military remedies, only in extraordinary circumstances. The Court continues to decline to clarify the proper scope of review that *habeas corpus* review of military court proceedings should follow. E.g., *Parker* v. *Levy*, 417 U.S. 733 (1974); *Secretary of the Navy* v. *Avrech*, 418 U.S. 676 (1974). See the discussion in *Calley* v. *Callaway*, 519 F. 2d 184, 194–203 (C.A. 5, 1975) (*en banc*), *cert den.*, 425 U.S. 911 (1976).

## Sec. 8, Cl. 16—The Militia Clause

**[P. 351, add to N. 1:]**

Organizing and providing for the militia being constitutionally committed to Congress and statutorily shared with the Executive, the judiciary is precluded from exercising oversight over the process, *Gilligan* v. *Morgan*, 413 U.S. 1 (1973), although wrongs committed by troops are subject to judicial relief in damages, *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).

## Sec. 8, Cl. 17—District of Columbia

### [P. 353, in text following N. 16, add:]

In 1973, Congress provided for a limited form of self-government in the District, with the major offices to be filled by election.[4.5] And in 1978, Congress referred to the States a constitutional amendment giving the District representation in the Senate and House of Representatives to the same extent as if it were a State.[5.5]

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[4.5] District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93–198, 87 Stat. 774.

[5.5] H.J. Res. 554, 95th Congress, passed the House on March 2, 1978, and the Senate on August 22, 1978.

### [P. 355, add to N. 29:]

The court system was sustained in *Palmore* v. *United States*, 411 U.S. 389 (1973). See also *Swain* v. *Pressley*, 430 U.S. 372 (1977) (sustaining a bar to federal court *habeas* review of local District of Columbia court criminal convictions).

## Sec. 9, Cl. 3—Bills of Attainder

### [P. 368, in text prior to last paragraph in section, add:]

Apparently withdrawing from the *Brown* analysis in upholding a statute providing for governmental custody of documents and recordings accumulated during the tenure of former President Nixon,[1.5] the Court set out a rather different formula for deciding bill of attainder cases.[2.5] The law specifically applied only to President Nixon and directed an executive agency to assume control over the materials and prepare regulations providing for ultimate public dissemination of at least some of them; the act assumed that it did not deprive the former President of property rights but authorized the award of just compensation if it should be judicially determined that there was a taking. First, the Court denied that the clause denies the power to Congress

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[1.5] The Presidential Recordings and Materials Preservation Act, P.L. 93-526, 88 Stat. 1695 (1974), note following 44 U.S.C. 2107. For an application of this statute, see *Nixon* v. *Warner Communications*, 435 U.S. 589 (1978).

[2.5] *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 468–484 (1977). Justice Stevens' concurrence is more specifically directed to the facts behind the statute than is the opinion of the Court, id., 484, and Justice White, author of the dissent in *Brown*, merely noted he found the act nonpunitive. Id., 487. Chief Justice Burger and Justice Rehnquist dissented. Id., 504, 536-545, 545. Adding to the impression of a departure from *Brown* is the quotation in the opinion of the Court at several points of the *Brown* dissent, id., 470 n. 31, 471 n. 34, while the dissent quoted and relied on the opinion of the Court in *Brown*. Id., 538, 542.

to burden some persons or groups while not so treating all other plausible individuals or groups; even the present law's specificity in referring to the former President by name and applying only to him did not condemn the act because he "constituted a legitimate class of one" as to whom Congress could "fairly and rationally" focus.[3.5] Second, even if the statute's specificity did bring it within the prohibition of the clause, the lodging of Mr. Nixon's materials with the GSA did not inflict punishment within the meaning of the clause. This analysis was a three-pronged one: 1) the law imposed no punishment traditionally judged to be prohibited by the clause; 2) the law, viewed functionally in terms of the type and severity of burdens imposed, could rationally be said to further nonpunitive legislative purposes; and 3) the law had no legislative record evincing a congressional intent to punish.[4.5] That is, the Court, looking "to its terms, to the intent expressed by Members of Congress who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effect", concluded that the statute served to further legitimate policies of preserving the availability of evidence for criminal trials and the functioning of the adversary legal system and in promoting the preservation of records of historical value, all in a way that did not and was not intended to punish the former President.

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[3.5] Id., 472. Justice Stevens carried the thought further although in the process he severely limited the precedential value of the decision. Id., 484.

[4.5] Id., 473–484.

## Sec. 10, Cl. 1—Ex Post Facto Laws

### [P. 381, add to N. 2:]

Applying *Bouie*, see *Marks* v. *United States*, 430 U.S. 188 (1977) (in context of § 9, cl. 3). And see *Splawn* v. *California*, 431 U.S. 595 (1977) (rejecting application of *Bouie*).

### [P. 381, in text following N. 6, add:]

In *Dobbert* v. *Florida*,[1.5] the Court may have formulated a new test for determining when a criminal statute is *ex post facto*. Defendant murdered two of his children; at the time of the commission of the offenses, Florida law provided the death penalty upon conviction for certain takings of life. Subsequent to the commissions of the capital offenses, the Supreme Court held laws similar to Florida's unconstitutional to the extent that death was a sentence under them, although convictions obtained under the statutes were not to be overturned,[2.5]

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[1.5] 432 U.S. 282, 297–298 (1977). Justices Stevens, Brennan, and Marshall dissented. Id., 304.

[2.5] *Furman* v. *Georgia*, 408 U.S. 238 (1972). The new law was sustained in *Proffitt* v. *Florida*, 428 U.S. 242 (1976).

and the Florida Supreme Court voided its death penalty statutes on the authority of the High Court decision. The Florida legislature then enacted a new capital punishment law which was sustained. Dobbert was convicted and sentenced to death under the new law which was enacted after the commission of his offenses. The Court rejected the *ex post facto* challenge to the sentence on the basis that whether the old statute was constitutional or not, "it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder."[3.5] Whether the "fair warning" standard is to have any prominent place in *ex post facto* jurisprudence may be an interesting question but it is problematical in any event whether the fact situation will occur often enough to make the principle applicable in very many cases.

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[3.5] Id., 432 U.S., 297.

**[P. 382, add to N. 11:]**

*Lindsey* was distinguished in *Dobbert v. Florida*, 432 U.S. 282, 298-301 (1977), in which the law enacted after the commission of the offense provided that anyone sentenced to life imprisonment must serve at least 25 years before becoming eligible for parole, a provision absent from the previous statute. While *Lindsey* said that the standard of punishment prescribed by the statute rather than the sentence actually imposed was the relevant consideration in *ex post facto* claims, the Court held *Lindsey* to its facts and rejected Dobbert's challenge because he had been sentenced to death, not to imprisonment.

**[P. 382, add to N. 19:]**

*Dobbert* v. *Florida*, 432 U.S. 282, 292-297 (1977), rejected an *ex post facto* challenge based on a statutory alteration of the role of judge and jury in the imposition of the death sentence, on the basis that the change was merely procedural, which was deemed sufficient for rejection standing alone, id. 292 n. 6, but additionally the change was ameliorative and did not make the law more onerous than it was before.

*Splawn* v. *California*, 431 U.S. 595, 599-601 (1977), similarly rejected an *ex post facto* claim based on an amendment to law enacted after commission of the offense which authorised an instruction to the jury on pandering; the instruction was given in Splawn's trial. Basis for the rejection is unclear, the Court on the one hand suggesting that because the amendment created no new substantive offense but merely declared what type of evidence may be received and considered the clause was not violated, but on the other hand accepting the state court construction that evidence of pandering would have been admissible before amendment of the law.

## Sec. 10, Cl. 1—Obligation of Contracts

**[P. 415, in text following N. 20, add new paragraph:]**

"[T]he Contract Clause remains a part of our written Constitution."[1.5] So saying, the Court in two cases resurrected the long dormant clause to strike down state legislation in two instances, one law involving the government's own contractual obligation and the other affecting private contracts.[2.5] A finding that a contract has been "impaired" in some way is merely the preliminary step in evaluating the validity of the state action.[3.5] But in both cases the Court applied a stricter-than-usual scrutiny to the statutory action, in the public contracts case precisely because it was its own obligation that the State was attempting to avoid and in the private contract case, apparently, because the legislation was in aid of a "narrow class".[4.5] The approach in any event is one of balancing. "The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation."[5.5] Having determined that a severe impairment had resulted in both cases,[6.5] the Court moved on to assess the justification for the state action. In *United States Trust*, the test utilized by the

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[1.5] *United States Trust Co. v. New Jersey*, 431 U.S. 1, 16 (1977). "It is not a dead letter." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978). A majority of the Court seems fully committed to using the clause. Only Justices Brennan, White, and Marshall dissented in both cases. Chief Justice Burger and Justices Rehnquist and Stevens joined both opinions of the Court. Of the three remaining Justices, who did not participate in one or the other case, Justice Blackmun wrote the opinion in *United States Trust* while Justice Stewart wrote the opinion in *Spannaus* and Justice Powell joined it.

[2.5] *United States Trust* involved a repeal of a covenant statutorily enacted to encourage persons to purchase New York-New Jersey Port Authority bonds by limiting the Authority's ability to subsidize rail passenger transportation. *Spannaus* involved a statute requiring prescribed employers who had a qualified pension plan to provide funds sufficient to cover full pensions for all employees who had worked at least 10 years if the employer either terminated the plan or closed his offices in the State, a law that greatly altered the company's liabilities under its contractual pension plan. In dissent in the latter case, Justice Brennan argued that the clause was inapplicable in that it prevented the relief of parties from their contractual obligations but did not prevent the imposition of additional duties on persons simply because they were parties to a contract on the same matter. 438 U.S., 251. But see id., 244 n. 16.

[3.5] 431 U.S., 21; 438 U.S., 244.

[4.5] 431 U.S., 22-28; 438 U.S., 248.

[5.5] 438 U.S., 245.

[6.5] 431 U.S., 17-21 (the Court was unsure of the value of the interest impaired but deemed it "an important security provision"); 438 U.S. 244-247 (statute mandated company to recalculate, and in one lump sum, contributions previously adequate).

Court was that an impairment would be upheld only if it were "necessary" and "reasonable" to serve an important public purpose. But the two terms were given somewhat restrictive meanings. Necessity is shown only when the State's objectives could not have been achieved through less dramatic modifications of the contract; reasonableness is a function of the extent to which alteration of the contract was prompted by circumstances unforeseen at the time of its formation. The repeal of the covenant in issue was found to fail both prongs of the test.[7.5] In *Spannaus*, the Court drew from its prior cases four standards: did the law deal with a broad generalized economic or social problem, did it operate in an area already subject to state regulation at the time the contractual obligations were entered into, did it effect simply a temporary alteration of the contractual relationship, and did the law operate upon a broad class of affected individuals or concerns. The Court found that the challenged law did not possess any of these attributes and thus struck it down.[8.5]

Whether these two cases portend an active judicial review of economic regulatory activities, in contrast to the extreme deference shown such legislation under the due process and equal protection clauses, is problematical. Both cases contain language emphasizing the breadth of the police powers of government that may be used to further the public interest and admitting limited judicial scrutiny. Nevertheless, "[i]f the Contract Clause is to retain any meaning at all . . . it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power."[8.6]

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[7.5] 431 U.S., 25-32 (State could have modified the impairment to achieve its purposes without totally abandoning the covenant, though the Court reserved judgment whether lesser impairments would have been constitutional, id., 30 n. 28, and it had alternate means to achieve its purposes; the need for mass transportation was obvious when covenant was enacted and State could not claim that unforeseen circumstances had arisen.)

[8.5] 438 U.S., 244-251.

[8.6] Id., 242 (emphasis by Court).

## Sec. 10, Cl. 2—Imposts or Duties on Imports and Exports by States

**[P. 415, following N. 10 in text, add:]**

Applying well settled rules, the Court unanimously upheld a state personal property tax upon business machines specially built by the company for foreign markets which were unsuitable for sale domestically but which were stored in the company's local warehouse. The prospect of eventual exportation, however certain, was not sufficient to immunize the machines from the tax, the Court held; immunity is not available until the article at issue begins its physical entry into the stream of exportation.[1.5]

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[1.5] *Kosydar v. National Cash Register Co.*, 417 U.S. 62 (1974).

[P. 417, in text following N. 23, add a new paragraph:]

Overruling a line of cases, the Court has now held that a nondiscriminatory ad valorem property tax imposed on imported goods that are no longer in transit is not the type of exaction regarded as objectionable by the Framers and is therefore permissible under this clause.[1.5]

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[1.5] *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976).

## Sec. 10, Cl. 3—Interstate Compacts

[P. 421, in text following N. 9, add:]

The Court has adhered to the *Virginia* v. *Tennessee* test, holding that the application of the compact clause is limited to agreements that are "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." Finding no enhancement of state power *quoad* the Federal Government, the Court held that the Multistate Tax Compact was validly entered into by participating States without congressional consent.[2.5]

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[2.5] *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978). Justices White and Blackmun dissented. The quoted passage is from *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893). See also *New Hampshire* v. *Maine*, 426 U.S. 363 (1976).

## ARTICLE II—EXECUTIVE DEPARTMENT

### Sec. 1—The President: Executive Power

**[P. 436, add to N. 21:]**

In a case raising many similarities to *Youngstown*, the validity of the President's Executive Order authorizing denial of government contracts to companies that failed or refused to comply with certain voluntary wage and price guidelines was sustained solely as a matter of statutory interpretation of certain congressional delegations. *AFL–CIO* v. *Kahn*, 618 F. 2d 784 (C.A.D.C.) (*en banc*), *cert. den.*, 443 U.S. 915 (1979). For the most recent analysis of the approach to determining the validity of presidential or other executive action purportedly founded on congressional delegation, see *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 301–316 (1979).

**[P. 437, Following N. 25, in text, add]**

The Court's opinion in *United States* v. *Nixon*[1.5] neither adds to nor subtracts from the argument over the theory of presidential inherent powers, but in practice, while it sustains the existence of executive privilege rooted in the conferral of executive powers upon the President by the Constitution, the decision illustrates quite meaningfully the accountability of the President within the constitutional system in which the courts are the ultimate arbiters of the validity of the assertion of a privilege to refuse to provide information to the courts in connection with the trial of criminal cases. The opinion does accord a high standing to claims of privilege based upon the existence of military, diplomatic, or sensitive national security secrets, but even there apparently the deference of the courts is not to be absolute.[2.5]

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[1.5] 418 U.S. 683 (1974). See also *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 441–455 (1977), and id., 504, 545 (Chief Justice Burger and Justice Rehnquist dissenting), upholding the Presidential Recordings and Materials Preservation Act against attacks on, *inter alia*, separation of powers and presidential privilege grounds. Holding that none of the departments of the Federal Government is absolutely separate from the others, the Court promulgated a balancing test, looking to whether the intrusion by one branch into the affairs of another threatens to prevent the latter "from accomplishing its constitutionally assigned functions", and where there is a "potential for disruption" determining "whether that impact is justified by an overriding need to promote objectives within the constitutional" power of the former branch. Id., 442–443. The analysis looks away from inherent power.

[2.5] *United States* v. *Nixon*, 418 U.S. 683, 706, 710 (1974).

## Sec. 2—Powers and Duties: Commander in Chief

**[P. 484, in text following last paragraph of section, add:]**

Over the President's veto, Congress enacted the War Powers Resolution,[3.5] designed to redistribute the war powers between the President and Congress. Although ambiguous in some respects, the Resolution appears to define restrictively the President's powers, to require him to report fully to Congress upon the introduction of troops into foreign areas, to specify a maximum time limitation on the engagement of hostilities absent affirmative congressional action, and to provide a means for Congress to require cessation of hostilities in advance of the time set. The Resolution states that the President's power to commit United States troops into hostilities, or into situations of imminent involvement in hostilities, is limited to instances of (1) a declaration of war, (2) a specific statutory authorization, or (3) a national emergency created by an attack on the United States, its territories or possessions, or its armed forces.[4.5] In the absence of a declaration of war a President must within 48 hours report to Congress whenever he introduces troops (1) into hostilities or situations of imminent hostilities, (2) into a foreign nation while equipped for combat, except in certain nonhostile situations, or (3) in numbers which substantially enlarge United States troops equipped for combat already located in a foreign nation.[5.5] The President is required to terminate the use of troops in the reported situation within 60 days of reporting, unless Congress (1) has declared war, (2) has extended the period, or (3) is unable to meet as a result of an attack on the United States, but the period can be extended another 30 days by the President's certification to Congress of unavoidable military necessity respecting the safety of the troops.[6.5] Congress may through the passage of a concurrent resolution require the President to remove the troops sooner.[7.5] The Resolution further states that no legislation, whether enacted prior to or subsequent to passage of the Resolution will be taken to empower the President to use troops abroad unless the legislation specifically does so and that no treaty may so empower the President unless it is supplemented by implementing legislation specifically addressed to the issue.[8.5] What the effect of adoption of the Resolution will be upon the nature of presidential power in this area and whether it will serve its purpose of reorienting the executive-legislative balance are questions which experience will answer.

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[3.5] P.L. 93-147, 87 Stat. 554. For the congressional intent and explanation see H. Rept. No. 93-287, S. Rept. No. 93-220, and H. Rept. No. 93-547 (Conference Report), all 93d Congress, 1st sess. (1973). The President's veto message is H. Doc. No. 93-171, 93d Congress, 1st sess. (1973).

[4.5] P.L. 93-147, 87 Stat. 554, § 2(c).

[5.5] Id., § 4(a).

[6.5] Id., § 5(b).

[7.5] Id., § 5(c).

[8.5] Id., § 8(a).

## Pardon and Reprieves

### [P. 475, add to N. 7:]

In *Schick* v. *Reed*, 419 U.S. 256 (1975), the Court upheld the presidential commutation of a death sentence to imprisonment for life with no possibility of parole. The foreclosure of parole was contrary to the scheme of the Uniform Code of Military Justice which does provide for the possibility of parole in all cases. "The conclusion is inescapable that the pardoning power was intended to include the power to commute sentences on conditions which do not in themselves offend the Constitution, but which are not specifically provided for by statute." Id., 264. Any limitation to the pardoning power must be found in the Constitution; Congress may not limit it by statute. Dissenting, Justices Marshall, Douglas, and Brennan argued that the President could impose only those conditions that had been provided for by Congress, Id., 268.

### [P. 476, add to N. 7:]

In the context of President Ford's pardon of former President Nixon prior to any indictment or other legal action, this sentence in the text was read by some as applying to the fact situation and as suggesting the invalidity of that pardon. The reference, however, is to a pardon in anticipation of the commission of an offense, not in anticipation of either indictment or conviction. "The pardoning power thus conferred is unlimited, with the exception of the impeachment restraint. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment." *Ex parte Garland*, 4 Wall. (71 U.S.) 333, 380 (1867). On the Nixon pardon controversy see *Pardon of Richard M. Nixon and Related Matters*, Hearings before the House Judiciary Subcommittee on Criminal Justice, 93d Cong., 2d sess. (1974).

## Treaty-Making Power

### [P. 489, add to N. 12:]

The issue whether Senate advice and consent alone to the Panama Canal treaties sufficed to dispose of United States property therein or whether under Article IV, sec. 2, cl. 2, Congress must carry out the transfer called for by the treaties through implementing legislation greatly occupied debate. See *Panama Canal Treaties*, Hearings before the Senate Foreign Relations Committee, 95th Congress, 1st & 2d sess. (1977–78); *Panama Canal Treaty (Disposition of United States Territory)*, Hearings before the Senate Judiciary Subcommittee on Separation of Powers, 1st sess. (1977); *The Panama Canal Treaty and the Congressional Power to Dispose of United States Property*, Report of the Senate Judiciary Subcommittee on Separation of Powers (Comm. Print.), 95th Congress, 2d sess. (1978). A divided Court of Appeals for the District of Columbia, on the merits, held that Senate approval of the treaty alone was sufficient. *Edwards* v. *Carter*, 580 F. 2d 1055 (C.A.D.C.), *cert. den.*, 436 U.S. 907 (1978).

### [P. 501, add to N. 7:]

Although the question was much debated in the Senate, neither it nor Congress as a whole ever came to a conclusion with respect to the validity of a notice of termination of a Mutual Defense Treaty with the Republic of China (Taiwan) as challenged by the argument that at least the Senate alone, and perhaps both Houses of Congress, must participate in the termination of a treaty. Senate Resolution 15, to disapprove presidential power alone, was amended and reported by the Senate Foreign Relations Committee to recognize at least 14 bases of presidential termination, S. Rept. No. 119, 96th Congress, 1st sess. (1979), and was then amended in the Senate to state, as the sense of the Senate, that approval of the Senate was required, 125 Cong. Rec. S7015, S7038–S7039, (daily ed., June 6, 1979) but the Senate never took final action on the resolution. A divided Court of Appeals for the District of Columbia Circuit approved on the merits the Presidents right to act alone, *Goldwater* v. *Carter*, 617 F. 2d 697 (C.A.D.C.) (en banc), but the Supreme Court vacated the decision and remanded the case with directions to dismiss the complaint. Id., 444 U.S. 996 (1979). There was no majority of the Court assembled on a rationale for its action.

**[P. 524, in text following N. 2, added:]**

But when Congress provided for selection of the members of the Federal Election Commission, two by the President, two by the Senate, and two by the House, with confirmation of all six members vested in both the House and the Senate, the Court unanimously held the scheme to violate the appointments clause and the principles of separation of powers. The term "officers of the United States" is a substantive one requiring that any appointee exercising significant authority pursuant to the laws of the United States be appointed in the manner prescribed by the appointments clause.[2.5] The Court did hold, however, that the Commission so appointed and confirmed could be delegated the powers Congress itself could exercise, that is, those investigative and informative functions that congressional committees carry out were properly vested in this body.

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[2.5] *Buckley* v. *Valeo*, 424 U.S. 1, 109–143 (1976). The Court took pains to observe that the clause was violated not only by the appointing process but by the confirming process, inclusion of the House of Representatives, as well. Id., 137.

## Sec. 3—The Removal Power

**[P. 535, following N. 15 in text, add:]**

A controversy arose regarding the discharge of the Special Prosecutor appointed to investigate and prosecute violations of law in the Watergate matter. Congress vested in the Attorney General the power to conduct the criminal litigation of the Federal Government,[1.5] and it further authorized him to appoint subordinate officers to assist him in the discharge of his duties.[2.5] Pursuant to presidential direction, the Attorney General designated a Watergate Special Prosecutor with broad power to investigate and prosecute offenses arising out of the Watergate break-in, the 1972 presidential election, and allegations involving the President, members of the White House staff, or presidential appointees. He was to remain in office until a date mutually agreed upon between the Attorney General and himself and the regulations provided that the Special Prosecutor "will not be removed from

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[1.5] 28 U.S.C. § 516.

[2.5] 28 U.S.C. §§ 509, 510, 515, 533.

his duties except for extraordinary improprieties on his part.”[3.5] On October 20, following the resignations of the Attorney General and the Deputy Attorney General, the Solicitor General as Acting Attorney General formally dismissed the Special Prosecutor[4.5] and three days later rescinded the regulation establishing the office.[5.5] In subsequent litigation, it was held that the firing by the Acting Attorney General had violated the regulations which were in force at the time and which had to be followed until they were rescinded.[6.5] The Supreme Court in *United States* v. *Nixon*[7.5] seems to have confirmed this analysis by the district court in upholding the authority of the new Special Prosecutor to take the President to court to obtain evidence in the President's possession. Left unsettled were two questions, the power of the President himself to go over the heads of his subordinates and to fire the Special Prosecutor himself, whatever the regulations said, and the power of Congress to enact legislation establishing an Office of Special Prosecutor free from direction and control of the President.[8.5]

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[3.5] 38 Fed. Reg. 14688 (1973). The Special Prosecutor's status and duties were the subject of negotiation between the Administration and the Senate Judiciary Committee. *Nomination of Elliot L. Richardson to be Attorney General*, Hearings before the Senate Judiciary Committee, 93d Congress, 1st sess. (1973), 143 passim.

[4.5] The formal documents effectuating the result are set out in 9 *Weekly Compilation of Presidential Documents* 1271–1272 (1973).

[5.5] 38 Fed. Reg. 29466 (1973). The Office was shortly recreated and a new Special Prosecutor appointed. 38 Fed. Reg. 30738, as amended by 38 Fed. Reg. 32805. See *Nomination of William B. Saxbe to be Attorney General*, Hearings before the Senate Judiciary Committee, 93d Congress, 1st sess. (1973).

[6.5] *Nader* v. *Bork*, 366 F. Supp. 104 (D.C.D.C. 1973).

[7.5] 418 U.S. 683, 692–697 (1974).

[8.5] The first question remained unstated but the second issue was extensively debated in *Special Prosecutor*, Hearings before the Senate Judiciary Committee, 93d Congress, 1st sess. (1973); *Special Prosecutor and Watergate Grand Jury Legislation*, Hearings before the House Judiciary Subcommittee on Criminal Justice, 93d Congress, 1st sess. (1973).

## The Presidential Aegis: Demands for Papers

**[P. 536, at end of section, add text:]**

Following years in which claims of executive privilege were resolved one way or another on the basis of the political strengths of the parties, in primarily interbranch disputes, the issue was in this period the subject of the first judicial elaboration of the doctrine to take place in our history; the doctrine of executive privilege was at once recognized as existing and having a constitutional foundation while at the same time it was definitely bounded in its assertion by the principle of judicial review. Because of these cases, because of the intensified congressional-presidential dispute, and especially because of the introduction of the issue into an impeachment proceeding, a somewhat lengthy treatment of the doctrine is called for at this point.

Conceptually, the doctrine of executive privilege may well reflect different considerations in different factual situations. Congress may seek information within the possession of the President, either in effectuation of its investigatory powers to oversee the conduct of officials of the Executive Branch or in effectuation of its power to impeach the President, Vice President, or civil officers of the Government. Private parties may seek information in the possession of the President either in civil litigation with the Government or in a criminal proceeding brought by government prosecutors. Generally, the categories of executive privilege have been the same whether it is Congress or a private individual seeking the information, but it is possible that the congressional assertion of need may over-balance the presidential claim to a greater degree than that of a private individual. The judicial precedents are so meager yet that it is not possible so to state, however.

The doctrine of executive privilege defines the authority of the President to withhold documents or information in his possession or in the possession of the executive branch from compulsory process of the legislative or judicial branch of the government. The Constitution does not expressly confer upon the Executive Branch any such privilege, but it has been claimed that the privilege derives from the constitutional provision of separation of powers and from a necessary and proper concept respecting the carrying out of the duties of the presidency imposed by the Constitution. Historically, assertion of the doctrine has been largely confined to the areas of foreign relations, military affairs, pending investigations, and intragovernmental discussions.[1.5] The current and ongoing litigation involved, of course, the claim of confidentiality of conversations between the President and his aides.

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[1.5] For a good statement of the basis of the doctrine, the areas in which it is asserted, and historical examples, see *Executive Privilege: The Withholding of Information by the Executive*, Hearings before the Senate Judiciary Subcommittee on Separation of Powers, 92d Congress, 1st sess. (1971), 420-442, (then-Assistant Attorney General Rehnquist). Former Attorney General Rogers, in stating the position of the Eisenhower Administration, identified five categories of executive privilege: (1) military and diplomatic secrets and foreign affairs, (2) information made confidential by statute, (3) information relating to pending litigation, and investigative files and reports, (4) information relating to internal government affairs privileged from disclosure in the public interest, and (5) records incidental to the making of policy, including interdepartmental memoranda, advisory opinions, recommendations of subordinates, and informal working papers. *The Power of the President To Withhold Information from the Congress, Memorandum of the Attorney General*, Senate Judiciary Subcommittee on Constitutional Rights, 85th Congress, 2d sess. (Comm. Print) (1958), reprinted as Rogers, "Constitutional Law: The Papers of the Executive Branch," 44 A.B.A.J. 941 (1958). In the most expansive version of the doctrine, Attorney General Kleindienst argued that the President could assert the privilege as to any employee of the Federal Government to keep secret any information at all. *Executive Privilege, Secrecy in Government, Freedom of Information*, Hearings before the Senate Government Operations Subcommittee on Intergovernmental Relations, 93d Congress, 1st sess. (1973), I:18 passim. For a strong argument that the doctrine lacks any constitutional or other legal basis, see R. Berger, *Executive Privilege: A Constitutional Myth* (Cambridge: 1974).

***Private Access to Government Information.***—Private parties may seek to obtain information from the Government either to assist in defense to criminal charges brought by the Government or in civil cases to use in either a plaintiff's or defendant's capacity in suits with the Government or between private parties.[2.5] In criminal cases, a defendant is guaranteed compulsory process to obtain witnesses by the Sixth Amendment and by the due process clause is guaranteed access to relevant exculpatory information in the possession of the prosecution.[3.5] Generally speaking, when the prosecution is confronted with a judicial order to turn over information to a defendant that it does not wish to make available, the prosecution has the option of dropping the prosecution and thus avoiding disclosure,[4.5] but that alternative may not always be available; in the Watergate prosecution only by revoking the authority of the Special Prosecutor and bringing the cases back into the confines of the Department of Justice could this possibly have been realized.[5.5]

The civil type of case is illustrated in *United States* v. *Reynolds*,[6.5] a tort claim brought against the United States for compensation for the deaths of civilians in the crash of an Air Force plane testing secret electronics equipment. Plaintiffs sought discovery of the Air Force's investigation report on the accident and the Government resisted on a claim of privilege as to the nondisclosure of military secrets. The Court accepted the Government's claim, holding that courts must determine whether under the circumstances the claim of privilege was appropriate without going so far as to force disclosure of the thing the privilege is designed to protect. The showing of necessity of the private litigant for the information should govern in each case how far the trial court should probe; where the necessity is strong,

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[2.5] There are also, of course, instances of claimed access for other purposes, for which the Freedom of Information Act, 80 Stat. 383 (1966), 5 U.S.C. § 552, provides generally for public access to governmental documents. In § 522(b), however, nine types of information are exempted from coverage, several of which relate to the types as to which executive privilege has been asserted, such as matter classified pursuant to executive order, interagency or intra-agency memoranda or letters, and law enforcement investigatory files. See *EPA* v. *Mink*, 410 U.S. 73 (1973); *Vaughn* v. *Rosen*, 484 F. 2d 820 (C.A.D.C. 1973), *cert. den.*, 415 U.S. 977 (1974).

[3.5] See *Brady* v. *Maryland*, 373 U.S. 83 (1963), and Rule 16, Federal Rules of Criminal Procedure. The earliest judicial dispute involving what later became known as executive privilege arose in *United States* v. *Burr*, 25 F. Cas. 30 and 187 (C.C.D. Va. 1807), in which defendant sought certain exculpatory material from President Jefferson. Dispute continues with regard to the extent of presidential compliance, but it appears that the President was in substantial compliance with outstanding orders if not in full compliance.

[4.5] E.g., *Alderman* v. *United States*, 394 U.S. 165 (1969).

[5.5] Thus, defendant in *United States* v. *Ehrlichman*, 376 F. Supp. 29 (D.C.D.C. 1974), was held entitled to access to material in the custody of the President wherein the President's decision to dismiss the prosecution would probably have been unavailing.

[6.5] 345 U.S. 1 (1953).

the court should require a strong showing of the appropriateness of the privilege claim but once satisfied of the appropriateness no matter how compelling the need the privilege prevails.[7.8]

***Prosecutorial and Grand Jury Access to Presidential Documents.***—Rarely will there be situations when federal prosecutors or grand juries seek information under the control of the President, since he has ultimate direction of federal prosecuting agencies, but the Watergate Special Prosecutor, being in a unique legal situation, was held able to take the President to court to enforce subpoenas for tape recordings of presidential conversations and other documents relating to the commission of criminal actions.[8.8] While holding that the subpoenas were valid and should be obeyed, the Supreme Court recognized the constitutional status of executive privilege, insofar as the assertion of that privilege relates to presidential conversations and indirectly to other areas as well.

Presidential communications, the Court said, have "a presumptive privilege." "The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution." The operation of government is furthered by the protection accorded communications between high government officials and those who advise and assist them in the performance of their duties. "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." The separation of powers basis derives from the conferral upon each of the branches of the Federal Government of powers to be exercised by each of them in great measure independent of the other branches. The confidentiality of presidential conversations flows then from the effectuation of enumerated powers.[8.9]

However, the Court continued, the privilege is not absolute. The federal courts have the power to construe and delineate claims arising under express and implied powers. Deference is owed the constitutional decisions of the other branches, but it is the function of the courts to exercise the judicial power, "to say what the law is." The

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[7.8] Id., 7–8, 9–10, 11. See also *Boeing Airplane Co.* v. *Coggeshall*, 280 F. 2d 654 (C.A.D.C. 1960); *Machin* v. *Zuckert*, 316 F. 2d 336 (C.A.D.C. 1963). And see *Totten* v. *United States*, 92 U.S. 105 (1875).

[8.8] *United States* v. *Nixon*, 418 U.S. 683, 692–697 (1974).

[8.9] Id., 707–708. Presumably, the opinion recognizes a similar power existent in the federal courts to preserve the confidentiality of judicial deliberations, cf. *New York Times Co. v. United States*, 403 U.S. 713, 752 n. 3 (1971) (Chief Justice Burger dissenting), and in each House of Congress to treat many of its papers and documents privileged. cf. *Soucie* v. *David*, 448 F. 2d 1067, 1080, 1081–1082 (C.A.D.C. 1971) (Judge Wilkey concurring); *Military Cold War Escalation and Speech Review Policies*, Hearings before the Senate Committee on Armed Services, 87th Congress, 2d sess. (1962), 512 (Senator Stennis). See *Calley* v. *Callaway*, 519 F. 2d 184 (C.A. 5. 1975) (en banc), cert. den., 425 U.S. 911 (1976); *United States* v. *Ehrlichman*, 389 F. Supp. 95 (D.C.D.C., 1974).

Judicial Branch has the obligation to do justice in criminal prosecutions, which involves the employment of an adversary system of criminal justice in which all the probative facts, save those clearly privileged, are to be made available. Thus, while the President 's claim of privilege is entitled to deference, the courts must when the claim depends solely on a broad, undifferentiated claim of confidentiality balance two sets of interests.

"In this case we must weigh the importance of the general privilege of confidentiality of presidential communications in performance of his responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

"On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. . . .

"We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice."[10.5]

Obviously, this decision leaves much unresolved. It does recognize the constitutional status of executive privilege as a doctrine. It does affirm the power of the courts to resolve disputes over claims of the privilege. But it leaves unsettled just how much power the courts have to review claims of privilege to protect what are claimed to be military, diplomatic, or sensitive national security secrets. It does not indicate what the status of the claim of confidentiality of conversations is when it is raised in civil cases; nor does it touch upon denial of information to Congress.

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[10.5] 418 U.S. 683, 711–713. Essentially the same decision had been arrived at in the context of subpoenas of tapes and documentary evidence for use before a grand jury in *Nixon* v. *Sirica*, 487 F. 2d 700 (C.A.D.C. 1973). Nothing in the Supreme Court's decision nor that of the Court of Appeals concerns directly the problem of enforcement of a judicial decision against the President, whether he may be judicially compelled to act. In a recent decision, it was held that the President himself could be compelled to perform a judicially-construed duty imposed by statute when no inferior officer is available to whom the order could be directed. *National Treasury Employees Union* v. *Nixon*, 492 F. 2d 587 (C.A.D.C. 1974). The decision was not appealed to the Supreme Court.

Neither does the Court's decision in *Nixon* v. *Administrator of General Services*[11.5] elucidate any of these or other questions that may be raised to any great degree. In upholding the Presidential Recordings and Materials Preservation Act, which directed the Government to take custody of former President Nixon's records to be screened, catalogued, and processed by professional archivists in GSA, the Court viewed the assertion of privilege as directed only to the facial validity of the requirement of screening by executive branch professionals and not at all to be related to the possible public disclosure of some of the records. The decision does go beyond the first decision's recognition of the overbalancing force of the necessity for disclosure in criminal trials to find "comparable" "adequate justifications" for congressional enactment of the law, including the preservation of the materials for legitimate historical and governmental purposes, the rationalization of preservation and access to public needs as well as each President's wishes, the preservation of the materials as a source for facilitating a full airing of the events leading to the former President's resignation for public and congressional understanding, and preservation for the light shed upon issues in civil or criminal litigation. While interestingly instructive, the decision may be so attuned to the narrow factual circumstances that led to the Act's passage as to leave the case of little value as precedent.

***Congressional Access to Executive Branch Information.***—Presidents and Congresses have engaged in protracted disputes over provision of information from the former to the latter, but the basic thing to know is that most congressional requests for information are complied with. The disputes, however, have been colorful and varied.[11.6] The basic premise of the concept of executive privilege, as it is applied to resist requests for information from Congress as from private parties with or without the assistance of the courts, is found in the doctrine of separation of powers, the prerogative of each coequal branch to operate within its own sphere independent of control or direction of the other branches. In this context, the President then asserts that phase of the claim of privilege relevant to the moment, such as confidentiality of communications, protection of diplomatic

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[11.5] 433 U.S. 425, 446–455 (1977). See id., 504, 545 (Chief Justice Burger and Justice Rehnquist dissenting). The decision does resolve one outstanding question; assertion of the privilege is not limited to incumbent Presidents. Id., 447–449.

[11.6] For conflicting accounts of many of the disputes and conflicting conclusions drawn therefrom, compare *Executive Privilege: The Withholding of Information by the Executive*, Hearings before the Senate Judiciary Subcommittee on Separation of Powers, 92d Congress, 1st sess. (1971), 420 (then-Assistant Attorney General Rehnquist), and *Executive Privilege, Secrecy in Government, Freedom of Information*, Hearings before the Senate Government Operations Subcommittee on Intergovernmental Relations, 93d Congress, 1st sess. (1973), 18 (then-Attorney General Kleindienst), with R. Berger, *Executive Privilege: A Constitutional Myth* (Cambridge: 1974), 163–208.

and military secrets, preservation of investigative records. Counterposed against this assertion of presidential privilege is the power of Congress to obtain information upon which to legislate, to oversee the carrying out of its legislation, to check and root out corruption and wrongdoing in the Executive Branch, involving both the legislating and appropriating function of Congress, and in the final analysis to impeach the President, the Vice President, and all civil officers of the Federal Government.

Until quite recently, all disputes between the President and Congress with regard to requests for information were settled in the political arena, with the result that few if any lasting precedents were created and only disputed claims were left to future argument. The Senate Select Committee on Presidential Campaign Activities, however, elected to seek a declaratory judgment in the courts with respect to the President's obligations to obey its subpoenas. The Committee lost its case but the courts based their rulings upon prudential considerations rather than upon questions of basic power, inasmuch as by the time the case was considered impeachment proceedings were pending in the House of Representatives.[13.5] The House Judiciary Committee subpoenas were similarly rejected by the President, but instead of going to the courts for enforcement the Committee adopted as one of its Articles of Impeachment the refusal of the President to honor its subpoenas.[14.5] Pending in the 93d and 94th Congresses were bills by which Congress would authorize congressional committees to go to court to enforce their subpoenas; the bills did not purport to define executive privilege, although some indicate a standard by which the federal court is to determine whether the material sought is lawfully being withheld from Congress.[15.5] The controversy gives little indication at the present time of abating[16.5] and it may be assumed that

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[13.5] *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 370 F. Supp. 521 (D.C.D.C.), *aff'd.*, 498 F. 2d 725 (C.A.D.C. 1974).

[14.5] President Nixon's position was set out in a June 9, 1974, letter to the Chairman of the House Judiciary Committee. 10 *Weekly Comp. of Pres. Docs.* 592 (1974). The impeachment article and supporting material are set out in H. Rept. No. 93-1305, 93d Cong., 2d sess. (1974).

[15.5] See S. 2432, 93d Cong., 1st sess. (1973), and S. Rept. No. 93-612. This bill passed the Senate December 15, 1973. And see H.R. 12462, 93d Cong., 2d sess. (1974), and H. Rept. No. [illegible]. See also S. 2170 and *Congressional Right to Information Act*, Hearings before the Senate Government Operations Subcommittee on Intergovernmental Relations, 94th Cong., 1st sess. (1975).

[16.5] Most of the disputes continue to be compromised. E.g., Secretary Kissinger's dispute with the House Select Committee on Intelligence, which had subpoenaed a classified memorandum from the State Department. The Secretary's claim of privilege related to the necessity of confidentiality in the formulation of policy. The document was in essence presented to the Committee in a collage of documents on the same subject matter without individual identification. See 73 Dept. of State Bull. 645, 748, 739 (1975), and 121 Cong. Rec. (daily ed.) H 10680 (November 5, 1975).

whenever the Executive and Congress are controlled by different political parties there will be persistent conflicts. One may similarly assume that the alteration of this situation would only reduce but not remove the disagreements.

## Sec. 2—Powers and Duties

**[P. 451, in text following N. 10, add:]**

***Impoundment of Appropriated Funds.***—In his Third Annual Message to Congress, President Jefferson established the first faint outline of what has been in recent years a major controversy. Reporting that $50,000 in funds which Congress had appropriated for fifteen gunboats on the Mississippi remained unexpended, the President stated that a "favorable and peaceful turn of affairs on the Mississippi rendered an immediate execution of the law unnecessary . . . ." But he was not refusing to expend the money, only delaying action to obtain improved gunboats; a year later, he told Congress that the money was being spent and gunboats were being obtained.[1.5] A few other instances of deferrals or refusals to spend occurred in the Nineteenth and early Twentieth Centuries but it was only with the Administration of President Franklin Roosevelt that a President refused to spend moneys for the purposes appropriated. Succeeding Presidents expanded upon these precedents and in the Nixon Administration a well-formulated plan of impoundments was executed in order to reduce public spending and to negate programs established by congressional legislation.[2.5]

Impoundment [3.5] has been defended by Administration spokesmen as being a power derived from the President's executive powers and particularly from his obligation to see to the faithful execution of the laws, i.e., his discretion in the manner of execution. The President, the argument goes, is responsible for deciding when two conflicting goals of Congress can be harmonized and when one must give way, when for example congressional desire to spend certain moneys must

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[1.5] 1 J. Richardson (comp.), *Messages and Papers of the Presidents* (Washington: 1897), 348, 360.

[2.5] History and law is much discussed in *Executive Impoundment of Appropriated Funds*, Hearings before the Senate Judiciary Subcommittee on Separation of Powers, 92d Congress, 1st sess. (1971); *Impoundment of Appropriated Funds by the President*, Hearings before the Senate Government Operations Ad Hoc Subcommittee on Impoundment of Funds, 93d Congress, 1st sess. (1973).

[3.5] There is no satisfactory definition of impoundment. Legislation enacted by Congress uses the phrase "deferral of budget authority" which is defined to include: "(A) withholding or delaying the obligation or expenditure of budget authority (whether by establishing reserves or otherwise) provided for projects or activities; or (B) any other type of Executive action or inaction which effectively precludes the obligation or expenditure of budget authority, including authority to obligate by contract in advance of appropriations as specifically authorized by law". § 1011(1), P.L. 93-344.

yield to congressional wishes to see price and wage stability. In some respects, impoundment is said or implied to flow from certain inherent executive powers that repose in any President. Finally, statutory support is sought; certain laws are said to confer discretion to withhold spending and it is argued that congressional spending programs are discretionary rather than mandatory.[4.5]

On the other hand, it is argued that Congress' powers under Article I, § 8, are fully adequate to support its decision to authorize certain programs, to determine the amount of funds to be spent on them, and to mandate the Executive to execute the laws. Permitting the President to impound appropriated funds allows him the power of item veto which he does not have and denies Congress the opportunity to override his veto of bills enacted by Congress. In particular the power of Congress to compel the President to spend appropriated moneys is said to derive from Congress' power "to make all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers of Congress and "all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."[5.5]

The President's decision to impound large amounts of appropriated funds led to two approaches to curtail the power. First, many persons and organizations with a reasonable expectation of receipt of the impounded funds upon their release brought large numbers of suits; with a few exceptions, these suits resulted in decisions denying the President either constitutional or statutory power to decline to spend or obligate funds and the Supreme Court, presented with only statutory arguments by the Administration, held that no discretion existed under the particular statute to withhold allotments of funds to the States.[6.5] Second, Congress in the course of revising its own manner of appropriating funds in accordance with budgetary responsibility provided for mandatory reporting of impoundments to Congress, for congressional disapproval of impoundments, and for court actions by the Comptroller General to compel spending or obligation of funds. [7.5] Presumably, judicial review of the workings of this statute will elucidate the constitutional and statutory principles that will guide future actions.

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[4.5] *Impoundment of Appropriated Funds by the President*, Hearings before the Senate Government Operations Ad Hoc Subcommittee on Impoundment of Funds, 93d Congress, 1st sess. (1973), 358 (then-Deputy Attorney General Sneed).

[5.5] Id., 1-6 (Senator Ervin).

[6.5] *Train v. City of New York*, 420 U.S. 35 (1975); *Train v. Campaign Clean Water*, 420 U.S. 136 (1975). See also *State Highway Comm. of Missouri v. Volpe*, 479 F. 2d 1099 (C.A. 8, 1973); *Commonwealth of Pennsylvania v. Lynn*, 501 F. 2d 848 (C.A.D.C., 1974).

[7.5] P.L. 93-344, title X, 88 Stat. 332 (1974), 31 U.S.C. §§ 1400-1407.

**Presidential Immunity From Judicial Direction**

[P. 571, at conclusion of second full paragraph on page, add:]

The issue, however, may well appear in a somewhat different light following the successful action of the Watergate Special Prosecutor in subpoenaing tape recordings and documents from the President, although the decisions occasioned thereby were couched in declaratory rather than coercive terms.[1.5] Nonetheless, some doubt with regard to the validity of prior firm statements in this regard must be expressed.

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[1.5] *United States* v. *Nixon*, 418 U.S. 683 (1974), and *Nixon* v. *Sirica*, 487 F. 2d 700 (C.A.D.C. 1973). And see *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F. 2d 725 (C.A.D.C. 1974). In *National Treasury Employees Union* v. *Nixon*, 492 F. 2d 587 (C.A.D.C. 1974), the court held that a writ of mandamus could issue to compel the President to perform a ministerial act, although it said that if any other officer were available to whom the writ could run it should be applied to him.

**Sec. 4—Impeachment**

[P. 578, at end of section add:]

*The Nixon Impeachment.*—For the first time in over a hundred years and for only the second time in the Nation's history, Congress moved to impeach the President of the United States, a move forestalled only by the resignation of President Nixon on August 9, 1974. In the course of the proceedings, there recurred strenuous argument with regard to the nature of an impeachable offense, whether only criminally-indictable actions qualify for that status or whether the definition is broader and of course no resolution was reached.[2.5] A second issue arose that apparently has not been considered before: whether persons subject to impeachment could be indicted and tried prior to impeachment and conviction or whether indictment could only

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[2.5] Analyses of the issue from different points of view are contained in Impeachment Inquiry Staff, House Judiciary Committee, *Constitutional Grounds for Presidential Impeachments*, 93d Congress, 2d sess. (1974) (Comm. Print); J. St. Clair, et al., Legal Staff of the President, *Analysis of the Constitutional Standard for Presidential Impeachment* (Washington: 1974); Office of Legal Counsel, Department of Justice, *Legal Aspects of Impeachment: An Overview, and Appendix I* (Washington: 1974). And see R. Berger, *Impeachment: The Constitutional Problems* (Cambridge: 1973), which preceded the instant controversy. The House Judiciary Committee recommended three articles of impeachment, for conduct at least one of which, refusal to honor the Committee's subpoenas, was not an indictable offense, and a second that mixed indictable and nonindictable offenses. *Impeachment of Richard M. Nixon, President of the United States*, H. Rept. No. 93-1305, 93d Cong., 2d sess. (1974). Mr. Nixon's resignation of course precluded further action on the issue, although the articles were submitted to and "accepted" by the House of Representatives. 120 Cong. Rec. 29219-29362 (1974).

follow the removal from office. In fact, the argument was really directed only to the status of the President, inasmuch as it was argued that he embodied the Executive Branch itself, while lesser executive officials and judges were not of that calibre.[3.5] That issue similarly remained unsettled, the Supreme Court declining to provide some guidance in the course of deciding a case on executive privilege.[4.5]

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[3.5] The question first arose during the grand jury investigation of former Vice President Agnew, during which the United States, through the Solicitor General, argued that the Vice President and all civil officers were not immune from the judicial process and that removal need not precede indictment, but as to the President it was argued that for a number of constitutional and practical reasons the President was not subject to the ordinary criminal process. *Memorandum for the United States, Application of Spiro T. Agnew*, Civil No. 73-965 (D.C.D.Md., filed October 5, 1973). One court specifically held that a federal judge was indictable and could be convicted prior to removal from office. *United States* v. *Isaacs*, 493 F. 2d 1124 (C.A. 7), *cert. den. sub nom. Kerner* v. *United States*, 417 U.S. 976 (1974).

[4.5] The grand jury had named the President as an unindicted coconspirator in the case of *United States* v. *Mitchell*, et al., No. 74-110 (D.C.D.C.), apparently in the belief that he was not actually indictable while in office. The Supreme Court agreed to hear the President's claim that the grand jury acted outside its authority, but finding that resolution of the issue was unnecessary to decision of the executive privilege claim it dismissed the petition for *certiorari* of the President as improvidently granted, *United States* v. *Nixon*, 418 U.S. 683, 687 n. 2 (1974).

# ARTICLE III—JUDICIAL DEPARTMENT

## Sec. 1—Judicial Power, Courts, Judges

### Legislative Courts: Courts of the District of Columbia

[P. 596, following N. 13 in text, add:]

Congress' action in establishing two separate court systems in the District of Columbia, one system of Article III courts with judges guaranteed tenure and salary and one system of Article I courts with judges of limited tenure and no salary guarantee, was sustained in *Palmore* v. *United States.*[1.5] When legislating for the District, Congress has the power of a local legislature and may, pursuant to the grant of power under Article I, § 8, cl. 17, vest jurisdiction to hear matters of local law and local concern in courts not having Article III characteristics. The defendant's claim that he was denied his constitutional right to be tried before an Article III judge was denied on the basis that it was not absolutely necessary that every proceeding in which a charge, claim, or defense based on an act of Congress or a law made under its authority need be conducted in an Article III court. State courts could hear cases involving federal law as could territorial and military courts. "[T]he requirements of Art. III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment."[2.5] Article III courts were still available in the District to which citizens could resort for consideration of constitutional and statutory matters of general concern, while the Article I courts heard cases of local import, including criminal cases arising under laws applicable only within the District.

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[1.5] 411 U.S. 389 (1973). On the District of Columbia courts, see also *Pernell* v. *Southall Realty*, 416 U.S. 363, 365–369 (1974); *Swain* v. *Pressley*, 430 U.S. 372 (1977); *Key* v. *Doyle*, 434 U.S. 59 (1977).

[2.5] Id., 411 U.S. 407–408. Under the Court's interpretation of the law, provision for hearing of motions for postjudgment relief by convicted persons in the District could be made in Article I courts. *Swain* v. *Pressley*, 430 U.S. 372 (1977). That there are constitutional constraints may be discerned from *Territory of Guam* v. *Olsen*, 431 U.S. 195, 201–202, 204 (1977).

## Sec. 1—Judicial Power: Contempt

[P. 609, following N. 14 in text, add:]

The holding in *Sacher* and other federal cases has now been significantly limited by due process constitutional rulings binding on both federal and state courts. In *Taylor* v. *Hayes*,[1.5] the Court held that, although a trial judge may summarily and without notice or hearing punish contemptuous conduct committed in his presence and observed by him, when he chooses to wait until the conclusion of the proceeding he must afford the alleged contemnor at least reasonable notice of the specific charges and opportunity to be heard in his own defense. Apparently, "a full scale trial" is not required.

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[1.5] 418 U.S. 488 (1974). In a companion case, the Court observed that although its rule might conceivably encourage a trial judge to proceed immediately to impose summary punishment rather than to await a calmer moment, "[s]ummary convictions during trial that are unwarranted by the facts will not be invulnerable to appellate review." *Codispoti* v. *Pennsylvania*, 418 U.S. 506, 517 (1974). Justice Rehnquist dissented. Id., 523.

**[P. 609, following N. 18 in text, add:]**

A jury trial is required when a trial judge awaits the conclusion of a proceeding, tries an alleged contemnor for conduct engaged in before the judge in court, and imposes separate sentences on each count of contempt which in the aggregate total more than six months; but in dictum the Court indicated that if the trail judge should punish each contempt as it occurs during the trial no jury trial will be required no matter what the aggregate total of the sentences.[2.5]

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[2.5] *Codispoti* v. *Pennsylvania*, 418 U.S. 506 (1974). Justices Blackmun, Stewart, Rehnquist and Chief Justice Burger thought no jury trial should be accorded in the instance of direct contempt in open court. Id., 522. For a tentative essay at defining a "petty offense" when a fine is levied, see *Muniz* v. *Hoffman*, 422 U.S. 454, 475–477 (1975).

**[P. 613, add to text at end of last paragraph of subsection:]**

Even in the absence of the kind of personal attack on a judge that would likely impair his detachment, a trial judge may be required to excuse himself and turn a citation for contempt over to another judge if the response to the alleged misconduct in his courtroom partakes of the character of "marked personal feelings" being abraded on both sides so that it is likely that the judge has felt a "sting" sufficient to impair his objectivity.[3.5]

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[3.5] *Taylor* v. *Hayes*, 418 U.S. 488 (1974). Justice Rehnquist dissented. Id., 523.

## Habeas Corpus

**[P. 617, add to N. 16:]**

For recent dicta with respect to Congress' power to withdraw *habeas* jurisdiction as it has been expanded since ratification of the Constitution, see *Swain* v. *Pressley*, 430 U.S. 372, 380 n. 13 (1977), and id., 384 (Chief Justice Burger concurring).

**[P. 619, in text following N. 4, add:]**

The Court has now begun a process of cutting back on the expansiveness with which it has made the writ available, although simultaneously it has again enlarged the number of claims which can be put forward on *habeas*. The restriction is two-fold. First, at least in case involving search and seizure claims, it has returned to the standard enunciated in *Frank* v. *Mangum*, holding that where the state courts afford a criminal defendant the opportunity for a full and adequate hearing on his Fourth Amendment claim, his only avenue of relief in the federal courts is to petition the Supreme Court for review and that he cannot present those claims again in a *habeas* petition.[1.5] Second, the Court has in effect modified *Fay* v. *Noia* by holding that in certain cases failure to raise a constitutional claim in the state proceedings will preclude a defendant from subsequently raising the claim on *habeas* even in the absence of a showing of a deliberate bypass.[2.5] Since these decisions, however, there does not appear to be an inclination of a majority of the Court to narrow further the availability of the writ.

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[1.5] *Stone* v. *Powell*, 428 U.S. 465 (1976). Justices Brennan and Marshall dissented. In *Kaufman* v. *United States*, 394 U.S. 217 (1969), a federal convict was permitted to raise a search and seizure issue he had presented at trial but which he had failed to present on direct appeal; *Stone* limits the decision, for the moment at least, to an exercise of the Court's supervisory powers, but some Justices have argued for its flat overruling. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250 (1973) (Justices Powell and Rehnquist and Chief Justice Burger). And see id., 249 (Justice Blackmun). The line of argument followed by the Court suggests that issues such as the admissibility of confessions and incriminating statements and the admissibility of eyewitnesses identifications are candidates for similar treatment. See, e.g., *Brewer* v. *Williams*, 430 U.S. 387, 413–414 (1977) (Justice Powell concurring), and id., 415 (Chief Justice Burger dissenting). *Rose* v. *Mitchell*, 443 U.S. 545, 550–564 (1979), rejected the argument that *Stone* should govern *habeas* contentions that the indicting grand jury was selected in a racially discriminatory fashion. Justices Powell and Rehnquist dissented on this point. Id., 579. The several factors cited by the Court as justifying a different rule than the one adopted in *Stone* appear to fit confession and identification questions into the *Stone* mold.

[2.5] *Wainwright* v. *Sykes*, 433 U.S. 72 (1977) (absent cause for noncompliance and resulting prejudice, a defendant who did not follow a procedural rule and raise at or prior to trial a challenge to the admissibility of certain admissions could not thereafter make the challenge on *habeas*); *Francis* v. *Henderson*, 425 U.S. 536 (1976) (failure to raise in state proceedings a claim of exclusion of Negroes from the indicting grand jury foreclosed raising claim on *habeas* absent a showing of cause and of actual prejudice arising from the claimed defect); *Estelle* v. *Williams*, 425 U.S. 501 (1976) (cause and prejudice must be shown before petitioner could raise on *habeas* claim that he had been unconstitutionally compelled to stand trial in jail garb in absence of issue having been raised at trial). But see *County Court of Ulster County* v. *Allen*, 442 U.S. 140, 147–154 (1979). *Francis* had been anticipated in part in *Davis* v. *United States*, 411 U.S. 233 (1973). See also *Tollett* v. *Henderson*, 411 U.S. 258 (1973). In *Lefkowitz* v. *Newsome*, 420 U.S. 283 (1975), because state law permitted raising constitutional claims even after a guilty plea, a prisoner for federal *habeas* purposes was not presumed to have waived his right to raise those claims on *habeas*.

On the other hand, the Court has held that convicted defendants may raise in the federal *habeas* courts the contention that the evidence introduced at his state trial could not reasonably support a finding of guilt beyond a reasonable doubt. According to the Court, the inquiry is not whether the reviewing court would find the evidence sufficient for it to have convicted but whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[illegible]

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[illegible] *Jackson v. Virginia*, 443 U.S. 307 (1979). Justices Stevens and Rehnquist and Chief Justice Burger dissented. Id., 326.

### [P. 619, add to N. 5:]

Indeed, the Court has now held "that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate or speedier release from that imprisonment, his sole federal remedy is a writ of *habeas corpus*." *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). *Habeas* may also lie when a prisoner is put under additional and unconstitutional restraints during his lawful custody, Id., 499. The holding was designed to preclude a prisoner's discretion to bring an action under either *habeas corpus* or under the civil rights statute, that meant that he could avoid the exhaustion requirement of *habeas*.

### [P. 620, add to N. 9:]

The Court continues to enlarge the meaning of "custody." In *Hensley v. Municipal Court*, 411 U.S. 345 (1973), it held that one who has been convicted in state court and who has exhausted all available state remedies is in custody when he has been released on bail or on his own recognizance. *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973), held that an inmate of an Alabama prison was sufficiently in the custody as well of Kentucky authorities who had lodged a detainer with Alabama to obtain the prisoner upon his release.

### [P. 621, add to N. 15:]

*Ahrens* was effectively overruled in *Braden v. 30th Judicial Circuit*, 410 U.S. 484 (1973), in which an inmate of an Alabama prison was permitted to bring a *habeas* action against Kentucky officials in federal district court in Kentucky inasmuch as the dispute concerned matters properly located in Kentucky. The *habeas* statute, 28 U.S.C., § 2241(a), was held not to require the filing of *habeas* petitions in the District where the prisoner is confined.

### [P. 621, at the conclusion of N. 19 on p. 622, add:]

The exhaustion requirement and its rationales are discussed at some length in *Preiser v. Rodriguez*, 411 U.S. 475, 490-497 (1973), and id., 500, 512-524 (Justice Brennan dissenting). A limited exception to the requirement was created in *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973), in which a person serving a jail sentence in one State was held entitled to bring a *habeas* action to require a second State to bring him to trial now so as not to deny him presently his right to a speedy trial. So long as he had exhausted state court remedies available to him now to present the constitutional claim he need not be required to await the trial in the second State and then to present his claim of denial of a speedy trial.

But the trend, evidenced in the case cited supra, p. [illegible], n. 3.3, is toward requiring exhaustion and barring access to the writ in those instances in which the petitioner has not previously presented his claims on his direct case.

## The Rule-Making Power

**[P. 625, add to N. 5:]**

When the Court sent to Congress proposed rules of evidence for federal courts, Congress by statute suspended them and provided for their effectiveness only through congressional enactment. P.L. 93-12, 87 Stat. 9 (1973). In the following year, a revised code of rules was enacted. P.L. 93-595, 88 Stat. 1926 (1975). Judicial revision of the rules governing habeas practice was also allowed and reenacted by Congress. P.L. 94-426, 90 Stat. 1334 (1976).

## Sec. 2—Jurisdiction: Cases and Controversies: Standing

**[P. 636, in text following N. 4, add:]**

Standing doctrine is at present in a state of flux. In the mid-1970's, the Court imposed both new requirements and stiffened old requirements in the process of narrowing access to federal courts for asserting constitutional claims.[4.1] However, in subsequent cases, it appeared either not to apply the standards as restrictively as many thought would be the case [4.2] or to relax the standards without acknowledging that it was doing so.[4.3] And in a recent case, in which the issue was mootness, the discussion by a narrow majority of the Court could be read to portend a modification of or relaxation of the "personal stake" requirement which would have significant ramifications throughout the doctrine of standing, not merely with respect to mootness.[4.4] Moreover, in its interpretation of civil rights laws, the Court has broadened Congress' powers to enlarge the standing of potential litigants [4.5] and has broadly interpreted enactments in ways that significantly enlarged rights of access to both federal and state courts.[4.6]

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[4.1] Warth v. Seldin, 422 U.S. 490 (1975); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976).

[4.2] E.g., *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

[4.3] E.g., *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978); *Bryant v. Yellen*, 447 U.S. 352 (1980).

[4.4] *United States Parole Comm. v. Geraghty*, 445 U.S. 388 (1980). Read broadly, the majority opinion would make the "personal stake" requirement a prudential one and premise standing to some undefined degree "upon the bare existence of a sharply presented issue in a concrete and vigorously argued case." Id., 404, n. 11, quoting and reserving full consideration of the dissent's argument at id., 420, n. 1, 420-421.

[4.5] *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979).

[4.6] *Maine v. Thiboutot*, 448 U.S. 1 (1980), is the key case. See also, *Maher v. Gagne*, 448 U.S. 122 (1980); *Owen v. City of Independence*, 445 U.S. 622 (1980); *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

**[P. 637, in text following N. 11, add:]**

In *United States* v. *Richardson*,[1.5] the Court rejected an effort to extend *Flast* v. *Cohen*, holding that a suit challenging congressional provision for secrecy in the budgetary accounts of the Central Intelligence Agency on the ground of violating Article I, § 9, cl. 7, could not be heard because it did not challenge an exercise of the taxing and spending power and it did not allege a specific limitation of the power in any event. Repeated was *Frothingham's* admonition against a taxpayer's use of "a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System."[2.5] The taxpayer's claim that without adequate information on CIA expenditures he could not fulfill his obligations as voter and citizen no doubt represented, the Court thought, "a genuine interest" on his part but "he has not alleged that, as a taxpayer, he is in danger of suffering any particular concrete injury as a result of the operation of this statute."[3.5] The taxpayer's interest was one shared by the public at large and it must be asserted through the political processes. A litigant must distinguish himself from the general citizenry, by showing a personal stake, a particular concrete injury, something more than "generalized grievances."[4.5]

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[1.5] 418 U.S. 166 (1974). See also *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

[2.5] *United States* v. *Richardson*, 418 U.S. 166, 173 (1974), quoting *Flast* v. *Cohen*, 392 U.S. 83, 106 (1968).

[3.5] 418 U.S. 166, 177.

[4.5] Id., 179–180. Justice Powell would have overturned the *Flast* test although he would have preserved the result of *Flast* itself. Id., 180. Justice Stewart would have found standing where the Constitution imposed an affirmative obligation upon government to the taxpayer, which he found met here. Id., 202. Justice Marshall joined this dissent and Justices Douglas and Brennan dissented separately. Id., 197, 235.

**[P. 638, in text following N. 15, add:]**

***Citizen Suits.***—Following *Richardson*, the Court held that a group of persons suing as citizens did not have standing to litigate a contention that membership of Members of Congress in the military reserves constituted a violation of Article I, § 6, cl. 2, forbidding any one "holding any office under the United States" to be a Member of Congress.[5.5] "The only interest all citizens share in the claim advanced by respondents is one which presents injury in the abstract. . . . [The] claimed nonobservance [of the clause], standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance. . . ." Thus, the rule remains "that standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share."[6.5]

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[5.5] *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974).

[6.5] Id., 217, 220.

***Standing of Members of Congress.***—The lower federal courts have been facing claims of a new species of standing based upon status, the Member of Congress qua Member. While the Supreme Court has yet to consider the issue on the merits,[7.5] the Court of Appeals for the District of Columbia Circuit, which has decided most of the cases,[8.5] has established a wavering line of doctrine. It seems clearly that a legislator "receives no special consideration in the standing inquiry",[9.5] and that he, along with every other person attempting to invoke the aid of a federal court, must show "injury in fact" as a predicate to standing. What that injury in fact may consist of, however, is the basis of the controversy. For example, in *Kennedy* v. *Sampson*,[10.5] the court in permitting a Senator to attack the President's pocket veto of a bill he had sponsored and voted for, found that "[t]he precise injury" claimed by the Senator was that the pocket veto "was an unconstitutional act that rendered plaintiff's vote in the Senate for the bill ineffective and deprived him of his constitutional right to vote to override the Presidential veto in an effort to have the bill passed without the President's signature. This claim of nullification of his vote for the bill and deprivation of his right to vote to override the veto, and thus inhibiting him in the performance of his Senatorial duties, is a clear allegation of injury in fact." A suit by Members for an injunction against continued prosecution of the Indochina war was held maintainable on the theory that if the court found the President's actions to be beyond the authority conferred by the Constitution, the holding would have a distinct and significant bearing upon the Members' duties

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[7.5] In *Pressler* v. *Blumenthal*, 434 U.S. 1028 (1978), *aff'g.*, 428 F. Supp. 302 (D.C.D.C. 1976) (three-judge court), the Court did affirm a decision in which the lower court had found Member standing but had gone on to decide against the Member on the merits. Justice Rehnquist appended a statement noting that "[o]ur 'unexplicated affirmance' without opinion could rest . . . on our conclusion that appellant lacked standing to litigate the merits of the question" as it could on agreement with the lower court's resolution of the issue on the merits. In *Goldwater* v. *Carter*, 444 U.S. 996 (1979), the Court vacated a decision and directed dismissal but none of the Justices who set forth reasons addressed the question of standing. The Court in *Coleman* v. *Miller*, 307 U.S. 433, 438 (1939), recognized that legislators can in some instances suffer an injury in respect to the effectiveness of their votes that will confer standing.

[8.5] Member standing has not fared well in other Circuits. *Holtzman* v. *Schlesinger*, 484 F. 2d 1307 (C.A. 2, 1973), *cert. den.*, 416 U.S. 936 (1974); *Harrington* v. *Schlesinger*, 528 F. 2d 455 (C.A. 4, 1975).

[9.5] *Reuss* v. *Balles*, 584 F. 2d 461, 466 (C.A.D.C.), *cert. den.*, 439 U.S. 997 (1978).

[10.5] 364 F. Supp. 1075, 1078 (D.C.D.C. 1973), *aff'd.*, 511 F. 2d 430 (C.A.D.C. 1974). Whether the affirmance of *Kennedy* was based only on nullification of past votes or also upon the nullification of an opportunity to vote has divided the Circuit, with the majority favoring the broader interpretation. *Goldwater* v. *Carter*, 617 F. 2d 697, 702 n. 12 (C.A.D.C.), and id., 711–712 (Judge Wright), vacated and remanded with instructions to dismiss, 444 U.S. 996 (1979).

to vote appropriations and other supportive legislation and to consider impeachment, a theory disavowed in subsequent cases.[11.5] In its most recent decision, the District of Columbia Circuit stated that "this court has carefully drawn a distinction between (1) a diminution in congressional influence resulting from an Executive action that nullifies a specific congressional vote or opportunity to vote, in an objectively verifiable manner—which, we have found, constitutes injury in fact;[12.5] and (2) a diminution in a legislator's effectiveness, subjectively judged by him or her, resulting from Executive action withholding information or failing to obey a statute enacted through the legislator's vote, where the plaintiff-legislator still has power to act through the legislative process—in which situations we do not find injury in fact.[13.5] To be cognizable for standing purposes, the alleged diminution in congressional influence must amount to a disenfranchisement, a complete nullification or withdrawal of a voting opportunity; and the plaintiff must point to an objective standard in the Constitution, statutes or congressional house rules, by which disenfranchisement can be shown".[14.5] Status of the principles relating to Member standing must be judged highly uncertain.[15.5]

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[11.5] *Mitchell* v. *Laird*, 488 F. 2d 611 (C.A.D.C. 1973). Later decisions have strongly disapproved the *Mitchell* analysis. *Harrington* v. *Bush*, 553 F. 2d 190, 207–210 (C.A.D.C. 1977); *Reuss* v. *Balles*, 584 F. 2d 461, 468 n. 15 (C.A.D.C.), *cert. den.*, 439 U.S. 997 (1978).

[12.5] Citing *Harrington* v. *Bush*, 553 F. 2d 190, 211–212 (C.A.D.C. 1977); *Kennedy* v. *Sampson*, 511 F. 2d 430, 435–436 (C.A.D.C. 1974).

[13.5] Citing *Reuss* v. *Balles*, 584 F. 2d 461, 467–468 & n. 20 (C.A.D.C.), *cert. den.*, 439 U.S. 997 (1978); *Metcalf* v. *National Petroleum Council*, 553 F. 2d 176, 188–189 (C.A.D.C. 1977); *Harrington* v. *Bush*, 553 F. 2d 190, 199 n. 41, 211–214 (C.A.D.C. 1977).

[14.5] *Goldwater* v. *Carter*, 617 F. 2d 697, 702 (C.A.D.C.) (*en banc*), *vacated and remanded with instructions to dismiss*, 444 U.S. 996 (1979). The failure of the Justices to remark on standing could have been *sub. silentio* agreement with the lower court, since it has stated that normally courts "turn initially, although not invariably, to the question of standing to sue," *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 215 (1974), but this would doubtless be a hazardous reading of the Court's action. See *Harrington* v. *Bush*, 553 F. 2d 190, 207 (C.A.D.C. 1977). As far as the Circuit Court's decision is concerned, on the matter of standing as well as issues touched on in the Supreme Court, the decision vacating the judgment below necessarily deprives that opinion of precedential effect. *United States* v. *Munsingwear*, 340 U.S. 36, 39–40 (1950); *O'Connor* v. *Donaldson*, 422 U.S. 563, 577 n. 12 (1975), so that the language is cited here solely as an indication of the thinking of the judges who subscribed to it.

[15.5] See also *Riegle* v. *Federal Open Market Committee*, 84 F. R. D. 114 (D.C.D.C. 1979). In *Edwards* v. *Carter*, 580 F. 2d 1055 (C.A.D.C.), *cert. den.*, 436 U.S. 907 (1978), the majority of the court reached the merits without passing on standing while one dissenting judge specifically found standing to exist. Id., 580 F. 2d, 1101 n. 42.

**[P. 638, add to N. 17:]**

More recent examples include *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *California Bankers Assn.* v. *Schultz*, 416 U.S. 21 (1974); *Rizzo* v. *Goode*, 423 U.S. 362, 371–373 (1976).

**[P. 639, add to N. 20:]**

"Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). That is, the actual or threatened injury required may exist solely by virtue of "statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617 n. 3 (1973); *O'Shea* v. *Littleton*, 414 U.S. 488, 493 n. 2 (1974). Examples of such conferrals are *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), and *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), in which the Court found that plaintiffs claiming to be "person[s] aggrieved" under the 1968 Civil Rights Act (Housing) had standing to complain of discriminatory conduct not directly aimed at them. See also *United States* v. *SCRAP*, 412 U.S. 669 (1973); *Buckley* v. *Valeo*, 424 U.S. 1, 8 n. 4, 11–12 (1976). But note that in *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), and see id., 64 (Justice Brennan concurring and dissenting), brought under the standing provision of the Administrative Procedure Act, the Court constitutionalized another element of standing that must therefore be met under Article III and that defeated standing in that case.

**[P. 639, in text following N. 21, add:]**

"Injury in fact," a concept developed in certain administrative law cases, has now been expressly found to meet the Article III injury requirement, dispensing with the "legal right" language. Environmental, aesthetic, and social interests, when impaired, afford a basis for making constitutional attacks upon governmental actions.[1.5] And, unlike the situation in taxpayer suits, there is no nexus requirement necessitating a plaintiff to show a connection between the injuries he claims and the

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[1.5] *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 72–74 (1978); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 261–263 (1977). See also, for implicit recognitions of the concept in constitutional cases, *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617–618 (1973); *O'Shea* v. *Littleton*, 414 U.S. 488, 493–494 (1974); *Warth* v. *Seldin*, 422 U.S. 490, 498–499 (1975); *Singleton* v. *Wulff*, 428 U.S. 106, 112–113 (1976). Cf. *Allee* v. *Medrano*, 416 U.S. 802 (1974); *Steffel* v. *Thompson*, 415 U.S. 452 (1974); *Doe* v. *Bolton*, 410 U.S. 179, 188–189 (1973). The breadth of the possible constitutional claim of injury in fact, with prudential considerations statutorily removed, may be noted in *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 111–115 (1979). The "legal right" language, however, seems to reappear in *Warth* v. *Seldin*, *supra*, 500–501, in the context of prudential standing rules.

constitutional rights he asserts. Injury flowing from the governmental action suffices.[2.5]

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[2.5] Thus, in *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 78–81 (1978), the plaintiffs' claimed environmental and health injuries were caused by the construction and operation of nuclear power plants but were not directly related to the governmental action they were challenging, the limitation of liability and indemnification in cases of nuclear accidents. Justice Stewart would have required a direct connection, id., 94, a formulation set out in *Flast* v. *Cohen*, 392 U.S. 83 (1968).

[P. 588, in text following N. 1, add new paragraph:]

In recent Terms the Court has formulated an additional element of standing and made it of constitutional rather than prudential import. This element requires that the injuries alleged to have been suffered must be fairly traced to the action challenged, that "but for" the action, the plaintiff would not have been injured. The Court has otherwise expressed the test to be that there must be a "substantial likelihood" that the relief sought from the court if granted would remove the harm.[1.5] Thus, low-income persons seeking the invalidation of a town's restrictive zoning ordinance were held to lack standing because they had failed to allege with sufficient particularity that the injury of which they complained, inability to obtain adequate housing within their means, was fairly attributable to the challenged ordinance instead of to other factors, so that voiding of the ordinance might not have had any effect upon their ability to find affordable housing.[1.6]

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[1.5] *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 72, 74–78 (1978); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 260–264 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 503–508 (1975); *Linda R. S.* v. *Richard D.*, 410 U.S. 614 (1973). The constitutionalization of the element was accomplished in *Simon*, *supra*, 37–39, 41–42, 45–46. In *Simon*, the Court held that poor people who had been denied service at some hospitals lacked standing to challenge IRS policy of extending favorable tax treatment to hospitals that did not serve indigents since they could not show that alteration of the tax policy would cause the hospitals to alter their policies and treat them. In *Linda R. S.*, *supra*, the Court held that the mother of an illegitimate child lacked standing to contest a prosecutorial policy of utilizing child support statutes to coerce support of legitimate children only since it was "only speculative" that prosecution would result in support rather than in jailing the father.

[1.6] *Warth* v. *Seldin*, 422 U.S. 490 (1975). But in *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 (1977), a person who alleged that he was actively seeking housing in the community and that he would qualify if the organizational plaintiff were not inhibited by allegedly racially discriminatory zoning laws from constructing in the community housing for low-income persons like himself had, when combined with the organization's detailed and specific housing plan, shown a "substantial probability" that voiding of the ordinance would afford him the desired housing opportunity.

But in the *Duke Power case*, the Court permitted plaintiffs to attack the constitutionality of a law limiting the liability of private utilities in the event of nuclear accidents and providing for indemnification on a showing that "but for" the passage of the law there was a "substantial likelihood", based upon industry testimony and other material in the legislative history, that the nuclear power plants would not be constructed and that therefore the environmental and aesthetic harm alleged by plaintiffs would not occur; thus, a voiding of the law would, because the industry would not proceed, relieve the plaintiffs of the complained of injuries.[5.5] This requirement makes difficult but not impossible, as recent cases show, the establishment of standing by persons indirectly injured by governmental action, that is, by action taken as to third parties that is alleged to have as a consequence injury to the claimants.[6.5]

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[5.5] *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 72–78 (1978). The likelihood of relief appears to be rather more speculative in *Bryant v. Yellen*, 447 U.S. 352, 366–368 (1980). And see *Orr v. Orr*, 440 U.S. 268, 271–273 (1979).

[6.5] "When a governmental prohibition or restriction imposed on one party causes specific harm to a third party, harm that a constitutional provision or statute was intended to prevent, the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights. . . . But it may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendant's actions, or that prospective relief will remove the harm." *Warth v. Seldin*, 422 U.S. 490, 505 (1975).

**[P. 642, add to N. 10:]**

See *California Bankers Assn. v. Schultz*, 416 U.S. 21 (1974). One who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement, but one need not await the consummation of a threatened injury to obtain preventive relief. That is, one is not required to expose himself to actual arrest or prosecution. When one alleges an intention to engage in conduct arguably affected with a constitutional interest but proscribed by statute and there exists a credible threat of prosecution thereunder, he may bring an action for declaratory or injunctive relief. *Babbitt v. United Farm Workers*, 442 U.S. 289, 297–305 (1979); *Wooley v. Maynard*, 430 U.S. 705, 707–708, 710 (1977); *Steffel v. Thompson*, 415 U.S. 452 (1974). Compare *Doe v. Bolton*, 410 U.S. 179, 188–189 (1973), with *Roe v. Wade*, 410 U.S. 113, 127–128 (1973).

**[P. 642, following N. 10 in text, add new paragraph:]**

The Court has made clear that the concept of ripeness is composed of both constitutional and prudential elements. The Article III essence of ripeness is the same as that of standing—injury and that relief sought will correct the matter—but the prudential element is simply a determination by the Court whether it will be better prepared to render a decision if it waited until the occurrence of the contingency that formed the basis of the claim.[1.5]

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[1.5] *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 81–82 (1978). See also *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138–148 (1974).

**[P. 644, in text following N. 15, add:]**

The Court is closely divided with respect to the standards by which to permit litigants, having Article III standing, to assert the rights of third parties not before the bench. All the Justices agree that the standards are prudential in nature; federal courts should hesitate to resolve a controversy on the basis of rights of third parties, because adjudication may be unnecessary and because the third parties will usually be the best proponents of their rights. One group of Justices favors a lenient standard, permitting third party representation when there is a close, perhaps confidential, relationship between the litigant and the third parties and when there is some genuine obstacle to third party assertion of their rights; the second group of Justices would permit a litigant to assert the rights of third parties only when the State directly interdicted the relationship between the litigant and the third parties through the criminal process and when litigation by the third parties is in all practicable terms impossible.[2.5]

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[2.5] *Singleton v. Wulff*, 428 U.S. 106 (1976). The precise issue was whether doctors who were denied Medicaid funds for the performance of abortions not "medically indicated", and who could thus assert their own rights, if any, could assert the rights of absent women to compensated abortions. The first group of Justices consists of Justices Blackmun, Brennan, White, and Marshall; the second, Justices Powell, Stewart, Rehnquist and Chief Justice Burger. Justice Stevens thought that on the facts establishing the doctors' own standing they could represent the women's rights also but he did not commit himself on the application of the analysis beyond the particular facts. All the Justices apparently agree that doctors subject to criminal prosecution for acts in treating their patients have standing to assert the rights of those patients. *Doe v. Bolton*, 410 U.S. 179, 188–189 (1973); *Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976). See also *Craig v. Boren*, 429 U.S. 190, 192–197 (1976), and *Carey v. Population Services Int.*, 431 U.S. 678, 682–684 (1977), both recognizing the right of vendors, with sufficient injury in fact to their interests, to assert the rights of their customers.

**[P. 644, in text following N. 16, add:]**

An organization or association "has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit."[1.5]

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[1.5] *Hunt* v. *Washington State Apple Advertising Comm.*, 432 U.S. 333, 343 (1977). See *Warth* v. *Seldin*, 422 U.S. 490, 510–517 (1975); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39–40 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263–264 (1977). In *Hunt*, the organization was not a voluntary membership organization but a state agency charged with furthering the interests of apple growers who were assessed annual sums to support the Commission. *Supra*, 432 U.S., 341–345.

**[P. 644, add to N. 18:]**

*Gooding* was followed in *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974). But in *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), the Court, 5-to-4, held that when expressive conduct, rather than "pure" speech, is involved, for a person validly covered by a statute to be able to challenge it for overbreadth, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id., 615. And in *Young* v. *American Mini Theatres*, 427 U.S. 50, 59–60, (1976), and see id., 73 (Justice Powell concurring), the Court adopted the *Broadrick* test, somewhat broadened, to govern vagueness challenges when the statute in question clearly covers the challenger's case. But see *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620–622 (1976); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 215–217 (1975).

**[P. 645, add to N. 23:]**

Congress altered the result of this case, authorizing *parens patriae* suits by state attorneys general in some circumstances on behalf of the citizenry of the State. P.L. 94–435, 90 Stat. 1383 (1976), 15 U.S.C. 15c et seq. The decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), however, largely reduced in importance the significance of the law.

**[P. 648, in text following N. 9, add:]**

Drawing on *Sierra Club*, the Court held that plaintiffs, who had pleaded that they used the natural resources of the Washington area, that rail freight rates would deter the recycling of used goods, and that their use of natural resources would be disturbed by the adverse environmental impact caused by the nonuse of recyclable goods, had standing as "persons aggrieved" under the Administrative Procedure Act to challenge the rates set. Neither the fact that large numbers of persons had suffered the injury nor the fact that the alleged injury to the environment was less direct and perceptible than others might be was justification for denying standing. The Court granted the plaintiffs might never be able to establish the "attenuated line of causation" from rate-setting to injury, but that was a matter for proof at trial, whereas in the present case the Court dealt only with the pleadings.[2.5]

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[2.5] *United States* v. *SCRAP*, 412 U.S. 669, 686–690 (1973). Justices White and Rehnquist and Chief Justice Burger dissented on the ground that the alleged injury was too remote, speculative, and insubstantial in fact to confer standing. Id., 722. But compare *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976).

### Real Interest

**[P. 654, add to N. 29:]**

The statement in the text is confirmed by *Steffel* v. *Thompson*, 415 U.S. 452 (1974). But note the modification in *Hicks* v. *Miranda*, 422 U.S. 332 (1975).

**[P. 655, add to N. 1:]**

See, e.g., *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), in which plaintiff challenged an admissions policy that kept him out of law school. Admitted pursuant to court order during pendency of the suit, he had entered his final semester by the time of oral argument in the Supreme Court and the Court was assured by university officials that he would be allowed to graduate regardless of the Court's ruling. The case was ordered dismissed as moot; nothing the Court could have done would have affected DeFunis at all. And see *Preiser* v. *Newkirk*, 422 U.S. 395 (1975).

**[P. 656, add to N. 7:]**

This exception was applied to prevent the mooting of attacks on abortion laws by plaintiffs who were pregnant at the time of the institution of the suit three years earlier, *Roe* v. *Wade*, 410 U.S. 113, 124–125 (1973). In *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974), a challenge to a state policy of paying public assistance to strikers was held not mooted by the termination of the strike, inasmuch as the continuing policy of the State provided a requisite degree of alleged injury to management interests, even in the absence of an actual strike, to justify declaratory relief if merited; even if the existence of a strike were necessary, the case would not be mooted because of the "capable of repetition, yet evading review" exception. The decision was, however, by a five-to-four vote.

**[P. 657, add to N. 10:]**

The more recent election cases have uniformly been held to remain viable after the holding of the election under the "capable of repetition, yet evading review" formula. E.g., *Storer* v. *Brown*, 415 U.S. 724, 737 n. 8 (1974).

**[P. 657, in text following N. 10, add:]**

An interesting and potentially significant liberalization of the continuing circumstances exception in occurring in the context of class action litigation. It has been clearly established that when the controversy becomes moot as to the plaintiff in a certified class action it still remains alive for the class he represents so long as an adversary relationship sufficient to constitute a live controversy between the class members and the other party exists.[1.5] The Court is closely divided,

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[1.5] *Sosna* v. *Iowa*, 419 U.S. 393 (1975); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 752–757 (1976). *Sosna* had tied its holding to the "capable of repetition, yet evading review" exception to the mootness doctrine, but *Franks* abandoned the connection. A suit which proceeds as a class action but without formal certification may not receive the benefit of this rule. *Board of School Comrs.* v. *Jacobs*, 420 U.S. 128 (1975). See also *Weinstein* v. *Bradford*, 423 U.S. 147 (1975); *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 430 (1976). But see the characterization of these cases in *United States Parole Comm.* v. *Geraghty*, 445 U.S. 388, 400 n. 7 (1980). Mootness is not necessarily invariably avoided in properly certified cases, but the standards of determination remain unclear. See *Kremens* v. *Bartley*, 431 U.S. 119 (1977).

however, with respect to the right of the named party, when the substantive controversy becomes moot as to him, to appeal as error the denial of a motion to certify the class which he sought to represent and which he still seeks to represent. It has held that such a named plaintiff retains a sufficient interest, "a personal stake", in his claimed right to represent the class in order to satisfy the "imperatives of a dispute capable of judicial resolution"; that is, his continuing interest adequately assures that "sharply presented issues" are placed before the court "in a concrete factual setting" with "self-interested parties vigorously advocating opposing positions."[4.3] The immediate effect of the decision is that litigation in which class actions are properly certified or in which they should have been certified will rarely ever be mooted if the named plaintiff (or in effect his attorney) chooses to pursue the matter even though the named plaintiff can no longer obtain any personal relief from the decision sought. Of much greater potential significance is the possible extension of the weakening of the "personal stake" requirement into other areas, such as the presentation of third-party claims in non-class actions and the initiation of some litigation in the form of a "private attorney general" pursuit of litigation.[4.4] It may well be that the evolution in this area will be confined to the class action context, but cabining of a "flexible" doctrine of standing is difficult.[4.5]

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[4.3] *United States Parole Comm.* v. *Geraghty*, 445 U.S. 388, 403 (1980). Justices Powell, Stewart, Rehnquist, and Chief Justice Burger dissented. Id., 409. In *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980), in an opinion by Chief Justice Burger, the Court held that a class action was not mooted when defendant tendered to the named plaintiffs the full amount of recovery they had asked for and could hope to retain. Plaintiffs' interest in shifting part of the share of costs of litigation to those who would share in its benefits if the class were certified was deemed to be a sufficient "personal stake", although the value of this interest was at best speculative.

[4.4] See *United States Parole Comm.* v. *Geraghty*, 445 U.S. 388, 404 and n. 11 (1980).

[4.5] Id., 410–424 (Justice Powell dissenting).

**[P. 657, add to N. 13:]**

See esp. *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973).

**[P. 658, add to N. 14:]**

See also *Michigan* v. *Payne*, 412 U.S. 47 (1973); *Gosa* v. *Mayden*, 413 U.S. 665 (1973); *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977); *Brown* v. *Louisiana*, 447 U.S. 323 (1980).

**[P. 658, add to N. 17:]**

A substantial majority of the Court adheres to the formula set forth in the text at nn. 17–18, *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977), although the Justices may divide over application. E.g., *Brown* v. *Louisiana*, 447 U.S. 323 (1980). Justice Powell advocates the solution proposed by Justice Harlan, full

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retroactivity for those cases on direct appeal at the time of the new ruling with cases on collateral review ordinarily considered in light of the rule as it stood when the conviction became final. *Hankerson* v. *North Carolina*, *supra*, 246; *Brown* v. *Louisiana*, *supra*, 335, 336 (joined in the latter case by Justice Stevens).

**[P. 658, add to N. 18:]**

But in *Robinson* v. *Neil*, 409 U.S. 505 (1973), the case of *Waller* v. *Florida*, 397 U.S. 387 (1970), barring as double jeopardy successive state and municipal prosecution of a person for the same conduct, was held fully retroactive, since it went to the issue of a second trial taking place at all and not to questions of fairness. The standards herein propounded were held inapplicable to decisions of the first category.

## Political Questions

**[P. 669, in text following N. 10, add:]**

***The Doctrine Reappears.***—Reversing a lower federal court ruling subjecting the training and discipline of National Guard troops to court review and supervision, the Court held that under Article I, § 8, cl. 16, the organizing, arming, and disciplining of such troops are committed to Congress and by congressional enactment to the Executive Branch. "It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches, directly responsible—as the Judicial Branch is not—to the elective process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." [1.5] The suggestion of the infirmity of the political question doctrine was rejected, since "because this doctrine has been held inapplicable to certain carefully delineated situations, it is no reason for federal courts to assume its demise." [2.5] In staying a grant of remedial relief in another case, the Court strongly suggested that the actions of political parties in national nominating conventions may also present issues not meet for judicial resolution.[3.5]

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[1.5] *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973). Similar prudential concerns seem to underlay, though they did not provide the formal basis for, decisions in *O'Shea* v. *Littleton*, 414 U.S. 488 (1974), and *Mayor* v. *Educational Equality League*, 415 U.S. 605 (1974).

[2.5] 413 U.S. 11. Other considerations of justiciability, however, id., 10, preclude using the case as square precedent on political questions. Justices Douglas, Brennan, Stewart, and Marshall dissented on mootness grounds. Id., 12.

[3.5] *O'Brien* v. *Brown*, 409 U.S. 1 (1972). The issue was mooted by the passage of time and was not thereafter considered on the merits by the Court. Id., 816. It was also not before the Court in *Cousins* v. *Wigoda*, 419 U.S. 477 (1975), but it was alluded to there. See, id., 483 n. 4, and id., 491 (Justice Rehnquist concurring). See also *Goldwater* v. *Carter*, 444 U.S. 996, 1002 (1979) (Justices Rehnquist, Stewart, and Stevens, and Chief Justice Burger using political question analysis to dismiss a challenge to presidential action). But see id. 997, 998 (Justice Powell rejecting analysis for this type of case).

## Judicial Review

### [P. 682, add to N. 25:]

Note the Court's opinion in *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), justifying the overruling of a 104-year-old precedent, *Low* v. *Austin*, 13 Wall. (80 U.S.) 29 (1872), and the divided opinion in *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979), overruling *Geer* v. *Connecticut*, 161 U.S. 519 (1896). On the other hand, see *United States* v. *Scott*, 437 U.S. 82 (1978), citing "the lessons of experience" to justify the overruling of a 3-year-old precedent, *United States* v. *Jenkins*, 420 U.S. 358 (1975). Contrast *Fry* v. *United States*, 421 U.S. 542 (1975), and *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), the former preserving while the latter overrules *Maryland* v. *Wirtz*, 392 U.S. 183 (1968).

### [P. 683, add to N. 5:]

Note the distinguishing of *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308 (1968), in *Lloyd Corp.* v. *Tanner*, 407 U.S. 551 (1972), and the subsequent disagreement among the Justices whether *Logan Valley* had been overruled in *Tanner* or in *Hudgens* v. *NLRB*, 424 U.S. 507 (1976).

## Federal Question Jurisdiction

### [P. 685, add to N. 14:]

For a recent problem, see *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974).

### [P. 688, add to N. 6:]

The restrictive interpretation was continued in *Johnson* v. *Mississippi*, 421 U.S. 213 (1975).

### [P. 691, add to N. 24:]

On police practices, compare *Allee* v. *Medrano*, 416 U.S. 802 (1974), with *Rizzo* v. *Goode*, 423 U.S. 362 (1976), and *O'Shea* v. *Littleton*, 414 U.S. 488 (1974). On prison practices, note the restriction imposed by *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973).

### [P. 691, add to N. 25:]

See esp. *Hagans* v. *Lavine*, 415 U.S. 528 (1974).

### [P. 691, add to N. 5:]

For decisions relating to pendent jurisdiction, see in the context of ancillary jurisdiction of third parties who could not have been originally sued in federal court, *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978); *Aldinger* v. *Howard*, 427 U.S. 1 (1976). The precise basis of the latter case was removed by the decision in *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978), but its analysis remains valid.

**[P. 692, add to N. 10:]**

*Hagans v. Lavine*, 415 U.S. 528 (1974), enlarged the number of cases that may be brought under ancillary jurisdiction by its treatment of the sufficiency of the substantiality of a constitutional claim.

**[P. 693, add to N. 15:]**

However, certain recent cases have seen the Court reviewing state court proceedings before they have become "final" in any conclusive sense. *North Dakota Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156, 159–164 (1973); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 246 (1974); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476–487 (1975).

**[P. 694, add to N. 22:]**

See also *California v. Krivda*, 409 U.S. 33 (1972). Note that in *California Dept. of Motor Vehicles v. Rios*, 410 U.S. 425 (1973), the Court remanded an appeal to the state court for a determination of the ground for decision as a predicate to deciding whether to accept review of the case.

**[P. 694, add to N. 18:]**

Decisions by state courts interpreting state constitutional provisions more liberally than the Supreme Court interprets the identical United States constitutional provision is one way of insulating from Court review decisions diverging from the High Court's jurisprudence. See Brennan, "State Constitutions and the Protection of Individual Rights," 90 Harv. L. Rev. 489 (1977). Occasionally, it will be possible to contest the state court decision as a denial of the opposing party's federal constitutional rights. Cf. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

**[P. 694, add to N. 19:]**

For recent internal Court disputes on the matter, see, e.g., *Oregon v. Hass*, 420 U.S. 714 (1975); *Idaho Dept. of Employment v. Smith*, 434 U.S. 100 (1977).

## Admiralty

**[P. 698, add to N. 8:]**

Another example of judicial lawmaking in this area is *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), in which the Court, overruling a line of cases, replaced the divided damages rule with one of comparative liability.

**[P. 703, following N. 13 in text, add:]**

In a case involving a plane crash in which the plane landed wholly fortuitously in navigable waters off the airport runway, the Court has now required that in aviation tort cases, absent congressional legislation, there must be in addition to the requisite situs a significant relationship to traditional maritime activity in order to invoke properly the admiralty jurisdiction of the federal courts. The Court did not rule out the possibility that under some circumstances, such as transoceanic flights, an aviation tort might have a sufficient maritime relationship but it was clear that there was none when a land-based plane flying from one point in the continental United States to another merely happened to wind up in navigable water.[1.5]

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[1.5] *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249 (1972).

**[P. 709, add to N. 24:]**

In *Askew v. American Waterways Operators*, 411 U.S. 325, 337–344 (1973), the Court, in holding that the States may constitutionally exercise their police powers respecting maritime activities concurrently with the Federal Government, such as by providing for liability for oil spill damages, noted that *Jensen* and its progeny, while still possessing vitality, have been confined to their facts; thus it is only with regard "to suits relating to the relationship of vessels, plying the high seas and our navigable waters, and to their crews" that state law is proscribed. Id., 344. See also *Sun Ship v. Pennsylvania*, 447 U.S. 715 (1980).

**[P. 713, add to N. 6:]**

By amendment to the LHWCA, 86 Stat. 1251 (1972), Congress broadened the definition of "navigable waters" to include in certain cases adjoining piers, wharfs, etc., and modified the definition of "employee" to mean any worker "engaged in maritime employment" within prescribed meanings. The amendments thus extended the Act shoreward and changed the "situs" test of eligibility to one looking to both the "situs" of the injury and the "status" of the injured. See *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

**[P. 715, add to N. 25:]**

*Sea-Land Services v. Gaudet*, 414 U.S. 573 (1974), began the process of developing the law to be applied to the *Moragne* wrongful death line of cases.

**Suits Against United States Officials**

**[P. 721, in text following paragraph in which N. 13 appears, add:]**

Distinguishing earlier cases as involving suits for common-law torts, the Court held in *Butz v. Economou*[13a] that federal officers enjoy only a qualified immunity in suits for constitutional torts. Standards for determining when liability is to be imposed, and for the retention of certain absolute immunities for quasi-judicial officers and others, are to be drawn from the jurisprudence developed under federal civil rights laws with respect to the liability and immunity of state and local governmental officials. Moreover, even when Congress has provided an alternative remedy against the United States, a suit against the individual officer will not be precluded except in situations which the Court is apparently disposed to interpret narrowly.[3.5]

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[13a] 438 U.S. 478 (1978). The decision was 5-to-4 and the Court continues closely divided. The right to sue in constitutional tort cases independently of any statutory authorization proceeds, of course, from *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See also *Davis v. Passman*, 442 U.S. 228 (1979) (suit against Congressman for sex discrimination brought under Fifth Amendment's due process clause); *Carlson v. Green*, 446 U.S. 14 (1980) (suit against prison officials under Eighth Amendment's cruel and unusual punishment clause).

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[3.5] Two exceptions to the permissibility of suit have been identified. The first is when special factors counsel hesitation in the absence of affirmative action by Congress. The second is when Congress has provided an alternative remedy which it explicitly declares to be a substitute for recovery directly under the Constitution and viewed as equally effective. *Carlson* v. *Green* 446 U.S. 14, 18–19 (1980).

## Power of Congress to Control Federal Courts

### [P. 755, add to N. 3:]

For a strong assertion of Congress' power over the jurisdiction of the lower federal courts, see *Palmore* v. *United States*, 411 U.S. 389, 400–402 (1973). See also *Swain* v. *Pressley*, 430 U.S. 372 (1977). And see *Taylor* v. *St. Vincent's Hospital*, 369 F. Supp. 948 (D.C.D.Mont. 1973), *aff'd*. 523 F. 2d 75 (C.A. 9), *cert. den*. 424 U.S. 948 (1976).

### [P. 756, add to N. 13:]

A statutory scheme similar to that in *Yakus* was before the Court in *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275 (1978), but statutory construction enabled the Court to pass by constitutional issues that were not perceived to be insignificant. See esp. id., 289 (Justice Powell concurring).

### [P. 758, add to N. 8:]

See the extensive discussion of *Klein* in *United States* v. *Sioux Nation*, 448 U.S. 371, 391–405 (1980), and id., 424, 427–434 (Justice Rehnquist dissenting).

### [P. 761, add to N. 23:]

Dicta in recent cases are suggestive, *Johnson* v. *Robison*, 415 U.S. 361, 366–367 (1974), indicated that an interpretation affording constitutional review of constitutional claims despite an ambiguous statute seeming to preclude review was necessary, inasmuch as the contrary construction "would, of course, raise serious questions concerning the constitutionality" of the provision. Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 761–762 (1975). In *Territory of Guam* v. *Olsen*, 431 U.S. 195, 201–202, 204 (1977), the Court again resorted to statutory interpretation "since a construction that denied Guam litigants access to Art. III courts for appellate review of local-court decisions might present constitutional questions." See also *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275 (1978).

## Federal-State Court Relations

### [P. 766, add to N. 22:]

State courts may entertain federal civil rights suits, brought under such statutes as 42 U.S.C. § 1983, *Martinez* v. *California*, 444 U.S. 277, 283 n. 7 (1980); *Maine* v. *Thiboutot*, 448 U.S. 1, 3 n. 1 (1980), but the Court has itself noted that it has "never considered . . . the question whether a State *must* entertain a claim under 1983." *Martinez*, *supra*. Federal law generally governs the standard of violation and liability in such cases, even though brought in state courts. Id., 283–284.

### [P. 767, add to N. 1:]

Recent decisions emphasize comity as the primary reason to restrict federal court actions tending to interfere with state courts. E.g., *O'Shea* v. *Littleton*, 414 U.S. 488, 499–504 (1974); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 599–603 (1975); *Hicks* v. *Miranda*, 422 U.S. 332, 348–350 (1975); *Juidice* v. *Vail*, 430 U.S. 327, 334 (1977); *Trainor* v. *Hernandez*, 431 U.S. 434, 441 (1977); *Moore* v. *Sims*, 442 U.S. 415, 430 (1979). The Court has cited comity as a reason to restrict access to federal *habeas corpus*. *Stone* v. *Powell*, 428 U.S. 465 (1976); *Francis* v. *Henderson*, 425 U.S. 536, 541 & n. 31 (1976); *Wainwright* v. *Sykes*, 433 U.S. 72, 83, 88, 90 (1977).

### [P. 769, add to N. 13:]

See also *Bellotti* v. *Baird*, 428 U.S. 132 (1976); *Elkins* v. *Moreno*, 435 U.S. 647 (1978); *Babbitt* v. *United Farm Workers*, 442 U.S. 289, 306–312 (1979); *Moore* v. *Sims*, 442 U.S. 415, 426–430 (1979).

### [P. 769, add to N. 15:]

In *Moore* v. *City of East Cleveland*, 431 U.S. 494, 521 (1977) (dissenting opinion), Chief Justice Burger argued for an expansion of the exhaustion doctrine, urging that when a criminal defendant has failed to exhaust administrative remedies before engaging upon the conduct for which he is ultimately convicted, the Court should refuse to review the conviction. The argument was rejected. Id., 497 n. 5.

### [P. 770, add to N. 17:]

A minority of Justices urge the application of some form of exhaustion in civil rights cases. E.g., *City of Columbus* v. *Leonard*, 443 U.S. 905 (1979) (dissent from denial of *certiorari*).

### [P. 771, add to N. 3:]

Congress has now repealed the general three-judge court statute. Three-judge courts are now to be convened only when authorized in particular statutes. P.L. 94–381, 90 Stat. 1119 (1976).

### [P. 773, add to N. 3:]

Congress may legislate away the Eleventh Amendment immunity of the States from suits when it enforces rights guaranteed by the 14th and 15th Amendments, *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976); *Hutto* v. *Finney*, 437 U.S. 678 (1978); *Maher* v. *Gagne*, 448 U.S. 122 (1980), although it must legislate clearly and unequivocally to be deemed to have done so. *Quern* v. *Jordan*, 440 U.S. 332 (1979). And it may legislate away the States' immunity under any of its powers with respect to suits brought in state court. *Maine* v. *Thiboutot*, 448 U.S. 1, 9 n.7 (1980).

### [P. 777, add to N. 2:]

*Steffel* v. *Thompson*, 415 U.S. 452 (1974), held that the availability of federal declaratory relief is not dependent upon the *Younger-Samuels* requirement of irreparable injury through bad-faith harassment when no state prosecution is pending. See also *Doran* v. *Salem Inn*, 422 U.S. 922 (1975). *Hicks* v. *Miranda*, 422 U.S. 332 (1975), modified this somewhat, holding that if a state action is begun before any significant federal court action has taken place the *Younger-Samuels* principles still apply. After completion of the state prosecution, if a federal plaintiff seeks prospective relief only and does not seek to disturb the prior conviction, *Younger* principles do not bar him. *Wooley* v. *Maynard*, 430 U.S. 705, 709–712 (1977). *Younger-Samuels* is fully applicable to civil proceedings in which important state interests are involved, presumably proceedings in which the State is a party. *Moore* v. *Sims*, 442 U.S. 415 (1979); *Trainor* v. *Hernandez*, 431 U.S. 434 (1977); *Juidice* v. *Vail*, 430 U.S. 327 (1977); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). In *Rizzo* v. *Goode*, 423 U.S. 362, 380 (1976), Justice Rehnquist seemed to speak as if all civil proceedings were covered. Federal courts are not to stay their hands if plaintiffs do not have an opportunity to fairly pursue their constitutional claims in the ongoing state proceeding, *Quern* v. *Hernandez*, 440 U.S. 951 (1979), or if they find the prosecution is guilty of harassment in bad faith without hope of obtaining a valid conviction. *Universal Amusement Co.* v. *Vance*, 559 F. 2d 1286, 1298–1301 (C.A. 5, 1977), *aff'd. per curiam sub. nom.*, *Dexter* v. *Butler*, 587 F. 2d 176 (C.A. 5) (en banc), *cert. den.*, 442 U.S. 929 (1979).

**[P. 770, add to N. 10:]**

On pre-conviction requirements of exhaustion, see *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973).

**[P. 778, add to N. 11:]**

If one does appeal to the Supreme Court, that Court's resolution of the matter against him by a four-to-four vote does not preclude subsequent *habeas* action. *Neil* v. *Biggers*, 409 U.S. 188, 189–192 (1972).

**[P. 780, in text following N. 32, add:]**

Change, however, is occurring in the Court. Recent decisions impose substantial restriction upon state prisoner access to *habeas*, as the Court modifies *Fay* v. *Noia* and *Brown* v. *Allen*.[1.5]

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[1.5] *Stone* v. *Powell*, 428 U.S. 465 (1976); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Francis* v. *Henderson*, 425 U.S. 536 (1976).

**[P. 782, add to N. 2:]**

See also *Johnson* v. *Mississippi*, 421 U.S. 213 (1975).

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# ARTICLE IV—STATES' RELATIONS

## Privileges and Immunities

**[P. 832, following N. 17 in text, add:]**

The recent cases emphasize that interpretation of the clause is tied to maintenance of the Union. "Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally."[1.5]

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[1.5] *Baldwin* v. *Montana Fish & Game Comm.*, 436 U.S. 371, 383 (1978). See also *Austin* v. *New Hampshire*, 420 U.S. 656, 660-665 (1975) (clause "implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism." Id., 662); *Hicklin* v. *Orbeck*, 437 U.S. 518, 523-524 (1978).

**[P. 836, add to N. 12:]**

The observation is true with respect only to suffrage, not to candidacy. *Baldwin* v. *Montana Fish & Game Comm.*, 436 U.S. 371, 383 (1978) (citing *Kanapaux* v. *Ellisor*, 419 U.S. 891 (1974); *Chimento* v. *Stark*, 353 F. Supp. 1211 (D.C.D.N.H.) *aff'd.* 414 U.S. 802 (1973)).

**[P. 836, in text following N. 12, add new paragraph:]**

In rare recent cases analyzing the validity of state legislation under this clause, the Court has formulated and applied a two-pronged test for evaluating state distinctions between residents and nonresidents.[1.6] First, the Court has held, it must be determined whether an activity in which a nonresident wishes to engage is within the protection of the clause. Such an activity must be "fundamental", must, that is, be essential or basic, "interference with which would frustrate the purposes of the formation of the Union, . . ." Justice Washington's opinion on Circuit in *Coryell* afforded the Court the standard; while recognizing that the opinion relied on notions of natural rights, the Court thought he used the term "fundamental" in the modern sense as

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[1.6] Although the clause specifically refers to "citizens", the Court treats the terms "citizens" and "residents" as "essentially interchangeable." *Austin* v. *New Hampshire*, 420 U.S. 656, 662 n. 8 (1975); *Hicklin* v. *Orbeck*, 437 U.S. 518, 524 n. 8 (1978).

well. Such activities as the pursuit of common callings within the State, the ownership and disposition of privately held property within the State, and the access to the courts of the State had been recognized in previous cases as fundamental and protected against unreasonable burdening; but sport and recreational hunting, the issue in the particular case, was not a fundamental activity. It had nothing to do with one's livelihood and implicated no other interest recognized as fundamental.[2.5]

Second, finding a fundamental interest protected under the clause, the Court employed a two-pronged analysis to determine whether the State's distinction between residents and nonresidents was justified. Thus, the State is compelled to show that nonresidents constitute a peculiar source of the evil at which the statute is aimed and that the discrimination bears a substantial relationship to the particular "evil" they are said to represent, e.g., that it is "closely tailored" to meet the actual problem. The discrimination against nonresidents in the instant case failed to pass either prong of the test.[2.6]

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[2.5] *Baldwin* v. *Montana Fish & Game Comm.*, 436 U.S. 371 (1978). In dissent, Justice Brennan proposed that all discrimination against nonresidents be covered by the clause, with the validity of such classifications to be determined by the two-pronged test he applied for the Court in *Hicklin*. Id., 394. In *Doe* v. *Bolton*, 410 U.S. 179, 200 (1973), the Court held violative of the clause a requirement that a woman be a resident of the State in order to qualify for an abortion in the State. Although the opinion speaks of "medical services", it may be limited to abortions which *Roe* v. *Wade*, 410 U.S. 113 (1973), recognized to be a fundamental right.

[2.6] *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978). Activity relating to pursuit of an occupation or common calling the Court recognized had long been held to be protected by the clause. The burden of showing constitutional justification was clearly placed on the State, Id., 526-528, rather than giving any statute a presumption of constitutionality. See *Mullaney* v. *Anderson*, 342 U.S. 415, 418 (1952) (under this clause). Thus, classifications under this clause and certain classifications under the equal protection clause are not entitled to the presumption.

**[P. 833, add to N. 12:]**

In *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), the Court held void a state commuter income tax, inasmuch as the State imposed no income tax on its own residents and thus the tax fell exclusively on nonresidents' income and was not offset even approximately by other taxes imposed upon residents alone.

### Interstate Rendition

**[P. 841, in text following N. 22, add:]**

In *Michigan* v. *Doran*,[1.5] the Court reasserted the limited role of a *habeas* court in reviewing extradition determination. "Once the governor has granted extradition, a court considering release on *habeas*

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[1.5] 439 U.S. 282 (1978).

*corpus* can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.”[2.5]

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[2.5] Id., 289. The opinion is ambiguous whether the governor's determination that the probable cause exists for the charge in the requesting State is at all judicially reviewable. The quotation in the text by implication and two passages at id., 290, strongly indicate it is not while other language at id., 289 implies that perhaps it is. Three concurring Justices argued that a reviewing court should review the request for a facial showing that a neutral magistrate has made a finding of probable cause. Id., 290, 297.

## Equality of States

### [P. 846, add to N. 4:]

Unanimously the Court has reaffirmed the *California*, *Louisiana*, and *Texas* cases in an action by the United States against the Atlantic Coastal States, including some of the original 13 States. The United States, to the exclusion of the States, has sovereign rights over the seabed and subsoil underlying the Atlantic Ocean, lying more than three miles seaward from the ordinary low water mark and from the outer limits of inland coastal waters, extending seaward to the outer edge of the continental shelf. Under our constitutional arrangement, paramount rights to these lands are an incident to national sovereignty and their control and disposition are the business of the Federal Government. *United States* v. *Maine*, 420 U.S. 515 (1975).

## Property and Territory

### [P. 848, in text following N. 10, add:]

Unanimously upholding a federal law to protect wild-roaming horses and burros on federal lands, the Court restated the applicable principles governing Congress' power under this clause. It empowers Congress to act as both proprietor and a legislature over the public domain; Congress has complete power to make those “needful rules” which in its discretion it determines are necessary. When Congress acts with respect to those lands covered by the clause, its legislation overrides conflicting state laws.[1.5]

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[1.5] *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976).

### [P. 850, add to N. 6:]

While recognizing that its decisions respecting the rights of the inhabitants of Puerto Rico “have been neither unambiguous nor exactly uniform,” *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 599 (1976), the Court's recent pronouncements have done little to remedy either situation. It seemed at one point to question the continuing vitality of the *Insular Cases*, *id.*, 600 n. 31, but overall it appears to be following a path of case-by-case determination of applicability of particular provisions. Thus, whether directly through the Bill of Rights sections themselves or indirectly through incorporation by the due process clause of the Fourteenth Amendment, Puerto Rico is constrained by equal protection principles, *Examining Board* v. *Flores de Otero*, *supra* (citizenship qualification for engineers held invalid), by search and seizure principles, *Torres* v. *Puerto Rico*, 442 U.S. 465 (1979), and by procedural due process guarantees. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). See also *Califano* v. *Torres*, 435 U.S. 1, 4 n. 6 (1978). Four Justices have argued that the Bill of Rights applies in full to Puerto Rico, *Torres* v. *Puerto Rico*, *supra*, 474, but *Harris* v. *Rosario*, 446 U.S. 651 (1980), announced that Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions."

## ARTICLE V—MODE OF AMENDMENT

**Ratification**

**[P. 858, in text following N. 24, add new paragraph:]**

Consideration of the proposed Twenty-seventh Amendment in the States has given rise to two constitutional questions not heretofore considered extensively—the right of States to rescind previous ratifications of a proposed amendment and the power of Congress to extend the time limitation previously agreed upon for the States to act. Four of the 35 States that have ratified the "Equal Rights Amendment" have now formally voted to rescind; [1.5] as the March 22, 1979, deadline for state action approached, Congress voted to extend the deadline in order to give the States more time.[2.5] The constitutional efficacy of both actions is subject to argument.

*Rescission.*—Once in our history, determination of the validity of rescission was critical to the success or failure of a proposed amendment. The Fourteenth Amendment was ratified by the legislatures of Ohio and New Jersey, both of which subsequently passed rescinding resolutions. Contemporaneously, the legislatures of Georgia, North Carolina, and South Carolina rejected ratification resolutions. Pursuant to the Act of March 2, 1867,[3.5] the governments of those States were reconstituted and the new legislatures ratified. Thus, there were presented both the question of the validity of a withdrawal and the question of the validity of a ratification following rejection. Congress requested the Secretary of State [4.5] to report on the number of States ratifying the proposal and the Secretary's message in response specifically noted the actions of the Ohio and New Jersey legislatures.

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[1.5] Nebraska, March 15, 1973; Tennessee, April 23, 1974; Idaho, February 8, 1977; Kentucky, March 16, 1978. The Kentucky rescission was attached to another bill and was vetoed by the Lieutenant Governor, acting as Governor, citing grounds that included a state constitutional provision prohibiting the legislature from passing a law dealing with more than one subject and a senate rule prohibiting the introduction of new bills within the last ten days of a session. Both the resolution and the veto message were sent by the Kentucky Secretary of State to the General Services Administration.

[2.5] H. J. Res. 638, 95th Congress, 2d sess. (1978), extended to June 30, 1982, the deadline for state ratification. See *Equal Rights Amendment Extension*, Hearings before the Senate Judiciary Subcommittee on the Constitution, 95th Congress, 2d sess. (1978).

[3.5] 14 Stat. 428.

[4.5] The Secretary was then responsible for receiving notice of ratification and proclaiming the adoption of constitutional amendments. The duty now resides in the Administrator of General Services. 1 U.S.C. 106b.

The Secretary then issued a proclamation reciting that 29 States, including the two which had rescinded and the three which had ratified after first rejecting, had ratified, which was one more than the necessary three-fourths. He noted that Ohio and New Jersey had attempted to withdraw and observed that "it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual for withdrawing the consent of the said two States, or of either of them, to the aforesaid amendment; . . . ."[5.5] He therefore certified "that if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of these States, which purport to withdraw the consent of said States from such ratifications, then the aforesaid amendment has been ratified, . . ."

The next day Congress adopted a resolution listing the 29 States, including Ohio and New Jersey, which had ratified, "being three-fourths and more of the several States of the Union," and concluding that the ratification process was completed.[6.5] The Secretary of State then proclaimed the Amendment a part of the Constitution.

In *Coleman* v. *Miller*,[7.5] the congressional action was interpreted as going directly to the merits of withdrawal after ratification and of ratification after rejection. "Thus, the political departments of the Government dealt with the effect of previous rejection and of attempted withdrawal and determined that both were ineffectual in the presence of an actual ratification."

Two interrelated questions are present here. To which governmental entity is committed the resolution of the question of the efficacy of rescission and what is the answer to the question by the body charged with resolving it? The Fourteenth Amendment precedent and *Coleman* v. *Miller* combine to appear to say that resolution is a political question committed to Congress and not one for the courts; what constitutional criteria are to guide Congress if it is determined to be the entity with the power to act is a much less easily resolved matter.

Prior to its decision in *Coleman* v. *Miller*, the Court had taken and decided several questions relating to the ratification process.[8.5] The absence of a majority opinion in *Coleman* and the lack of any subsequent decision on point make the resolution of the question of the

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[5.5] 15 Stat. 706, 707.

[6.5] 15 Stat. 709.

[7.5] 307 U.S. 433, 448–450 (1939) (plurality opinion). For an alternative construction of the Fourteenth Amendment precedent, see Corwin & Ramsey, "The Constitutional Law of Constitutional Amendment," 27 Notre Dame Law. 185, 201–204 (1951). The legislature of New York attempted to withdraw its ratification of the Fifteenth Amendment; although the Secretary of State listed New York among the ratifying States, noting the withdrawal resolution, there were ratifications from three-fourths of the States without New York. 16 Stat. 1131.

[8.5] *See Text, pp. 860–861.*

political question doctrine application to all matters of ratification inconclusive but six of the eight participating Justices were in agreement that the power of rejecting States to subsequently ratify, and the parallel power of ratifying States to rescind, presented political questions and that Congress' discretion to decide the issues was final and unreviewable by the courts.[9.5] "We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment."[10.5] For himself and three other Justices, Justice Black would have gone even further and held that Congress had the final, unreviewable determination with respect to every step in the process of submission and ratification of a constitutional amendment.[11.5]

Finding that resolution of the question is committed to Congress merely locates the situs of the power, however, and says nothing about what the resolution should be. That Congress in the past has refused to accept rescissions is but the starting point, inasmuch as, unlike courts, Congress operates under no principle of *stare decisis* so that the decisions of one Congress on a subject do not bind future Congresses. If Congress were to be faced with a decision about the validity of rescission, to what standards should it look?

That a question of constitutional interpretation may be "political" in the sense of being committed to one or to both of the "political"

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[9.5] In *Baker* v. *Carr*, 369 U.S. 186, 214 (1962), the Court in explaining the political question doctrine and categorizing cases observed that *Coleman* v. *Miller* "held that the questions of how long a proposed amendment to the Federal Constitution remained open to ratification, and what effect a prior rejection had on a subsequent ratification, were committed to congressional resolution and involved criteria of decision that necessarily escaped the judicial grasp." Both characteristics were features that the Court in *Baker*, *supra*, 217, identified as elements of political questions, e.g., "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it". Later formulations have adhered to this way of expressing the matter. *Powell* v. *McCormack*, 395 U.S. 486 (1969); *O'Brien* v. *Brown*, 409 U.S. 1 (1972); *Gilligan* v. *Morgan*, 413 U.S. 1 (1973). See also *Goldwater* v. *Carter*, 444 U.S. 996 1002 (1979) (plurality opinion).

[10.5] *Coleman* v. *Miller*, 307 U.S. 433, 450 (1939).

[11.5] Id., 456. In *Dyer* v. *Blair*, 390 F. Supp. 1291, 1299–1308 (D.C.N.D.Ill. 1975) (three-judge court), then-Judge Stevens concluded that not all such issues are political questions and proceeded to adjudicate the validity of a legislative requirement of an extraordinary majority to ratify. His rationale was that unlike those matters treated in *Coleman*, the question at issue was not one previously considered and decided by Congress. Notice, however, that this distinction finds no support in the Black concurrence and is problematical at most in light of the three-Justice plurality's opinion (labeled the opinion of the Court), in dealing with whether the Court should pass on the reasonableness of the time an amendment may pend before the States in the absence of a congressional fixing of that time. See *Coleman*, *supra*, 452–454. And see *Goldwater* v. *Carter*, 444 U.S. 996, 1002–1003 (1979) (plurality opinion). But see id., 997, 998–1000 (Justice Powell).

branches is not, of course, a judgment that in its resolution the political branch may decide without recourse to principle. Resolution of political questions is not subject to judicial review, so that the prospect of court overruling is not one with which the decisionmaker need trouble himself. But both legislators and executive are bound by oath to observe the Constitution[12.5] and consequently it is with the original document that the search for an answer must begin.

At the same time, it may well be that the Constitution affords no answer; it may not speak to the issue. Generally, in the exercise of judicial review, courts view the actions of the legislative and executive branches in terms not of the wisdom or desirability or propriety of their actions but in terms of the comportment of those actions with the constitutional grants of power and constraints upon those powers; if an action is within a granted power and violates no restriction, the courts will not interfere. How the legislature or the executive decides to deal with a question within the confines of the powers each constitutionally have is beyond judicial control.

Therefore, if the Constitution commits decision on an issue to, say, Congress, and imposes no standards to govern or control the reaching of that decision, in its resolution Congress may be restrained only by its sense of propriety or wisdom or desirability, may be free to make a determination solely as a policy matter. The reason that these issues are not justiciable is not only that they are committed to a branch for decision without intervention by the courts but also that the Constitution does not contain an answer. This interpretation, in the context of amending the Constitution, may be what Chief Justice Hughes was deciding for the plurality of the Court in *Coleman*.[13.5]

Article V may be read to contain a governing constitutional principle, however. Thus, it can be argued that as written the provision contains only language respecting ratification and that inexorably once a State acts favorably on a resolution of ratification it has exhausted its jurisdiction over the subject and cannot rescind,[14.5] nor can Con-

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[12.5] Article VI, parag. 3. "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." *United States* v. *Nixon*, 418 U.S. 683, 703 (1974).

[13.5] *Coleman* v. *Miller*, 307 U.S. 433, 450, 453 (1939). Thus, considering the question of ratification after rejection, the Chief Justice found "no basis in either Constitution or statute" to warrant the judiciary in restraining state officers from notifying Congress of a State's ratification, so that it could decide to accept or reject. "Article 5, speaking solely of ratification, contains no provision as to rejection." And in considering whether the Court could specify a reasonable time for an amendment to be before the States before it lost its validity as a proposal, Chief Justice Hughes asked: "Where are to be found the criteria for such a judicial determination? None are to be found in Constitution or statute." His discussion of what Congress could look to in fixing a reasonable time, *id.*, 453–454, is overwhelmingly policy-oriented. On this approach generally, see Henkin, "Is There a 'Political Question' Doctrine?", 85 Yale L.J. 597 (1976).

[14.5] *See, e.g.*, the debate between Senator Conkling and Senator Davis on this point in 39 *Cong. Globe* 1477–1481 (1870).

gress even authorize a State to rescind.[15.5] This conclusion is premised on Madison's argument that a State may not ratify conditionally, that it must adopt "*in toto* and *for ever*." [16.5] While the Madison principle may be unexceptionable in the context in which it was stated, it may be doubted that it transfers readily to the significantly different issue of rescission.

A more pertinent principle would seem to be that expressed in *Dillon* v. *Gloss*,[17.5] one of the pre-*Coleman* cases dealing with the amendment process. In that case, the action of Congress in fixing a seven-year period within which ratification was to occur or the proposal would expire was attacked as vitiating the amendment. The Court, finding no express provision in Article V, nonetheless thought it "reasonably implied" therein "that the ratification must be within some reasonable time after the proposal." Three reasons underlay the Court's finding of this implication and they are suggestive on the question of rescission. "First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three fourths of the states, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which, of course, ratification scattered through a long series of years would not do." [18.5]

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[15.5] "Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment," Memorandum of the Assistant Attorney General, Office of Legal Counsel, Department of Justice, in *Equal Rights Amendment Extension*, Hearings before the Senate Judiciary Subcommittee on the Constitution, 95th Congress, 2d sess. (1978), 80, 91–92.

[16.5] During the debate in New York on ratification of the Constitution, it was suggested that the State approve the document on condition that certain amendments the delegates thought necessary be adopted. Madison wrote: "The Constitution requires an adoption in toto and for ever. It has been so adopted by the other States. An adoption for a limited time would be as defective as an adoption of some of the articles only. In short any condition whatever must viciate the ratification." 5 *The Papers of Alexander Hamilton*, H. Syrett ed. (New York: 1962), 184.

[17.5] 256 U.S. 368 (1921).

[18.5] Id., 374–375. The Court derived these three factors not only from the structure of Article V but as well from the following consideration. "Thus the people of the United States, by whom the Constitution was ordained and established, have made it a condition to amending the instrument that the amendment be submitted to representative assemblies in the several states and be ratified in three-fourths of them. The plain meaning of this is (a) that all amendments must have the sanction of the people of the United States, the original fountain of power, acting through representative assemblies, and (b) that ratification by these assemblies in three fourths of the states shall be taken as a decisive expression of the people's will and be binding on all." Id., 374.

Although addressed to a different issue, the Court's discussion of the length of time an amendment may reasonably pend before losing its viability is suggestive with respect to rescission. That is, first, with proposal and ratification as successive steps in a single endeavor, second, with the necessity of amendment forming the basis for adoption of the proposal, and, third, especially with the implication that an amendment's adoption should be "sufficiently contemporaneous" in the requisite number of States "to reflect the will of the people in all sections at relatively the same period," it would raise a large question were the ratification process to be one in which there was counted one or more States which at the same time other States were acting affirmatively were acting to withdraw their expression of judgment that amendment was necessary. The "decisive expression of the people's will" that is to bind all might well in those or similar circumstances be found lacking. Employment of this analysis would not necessarily lead in specific circumstances to failures of ratification; the particular facts surrounding the passage of rescission resolutions, for example, might lead Congress to conclude that the requisite "contemporaneous" "expression of the people's will" was not undermined by the action.

And employment of this analysis would still seem, under the precedents, to leave to Congress the crucial determination of the success or failure of ratification. At the same time it was positing this analysis in the context of passing on the question of Congress' power to fix a time limit, the Court in *Dillon* v. *Gloss* observed that Article V left to Congress the authority "to deal with subsidiary matters of detail as the public interests and changing conditions may require."[20.2] And in *Coleman* v. *Miller*, Chief Justice Hughes went further in respect to these "matters of detail" being "within the congressional province" in the resolution of which the decision by Congress "would not be subject to review by the courts."[20.3]

Thus, it may be that if the *Dillon* v. *Gloss* construction is found persuasive, Congress would have constitutional standards to guide its decision on the validity of rescission. At the same time, if the precedents reviewed above are adhered to, and strictly applied, it appears that the congressional determination to permit or to disallow rescission would not be subject to judicial review.

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[20.2] Id., 375-376. It should be noted that the Court seemed to retain the power for itself to pass on the congressional decision, saying "[o]f the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt" and noting later than no question existed that the seven-year period was reasonable. Ibid.

[20.3] 307 U.S. 433, 452-454 (1939). It is, as noted above, not entirely clear to what extent the Hughes plurality exempted from judicial review congressional determinations made in the amending process. Justice Black's concurrence thought the Court "treated the amending process of the Constitution in some respects as subject to judicial review, in others as subject to the final authority of Congress" and urged that the *Dillon* v. *Gloss* "reasonable time" construction be disapproved. Id., 456, 458.

***Extension of Time.***—Debate upon the power of Congress to extend the time within which the States could consider the proposed Twenty-seventh Amendment turned largely upon two questions: whether there would be judicial review of an extension and, in any event, whether Congress had the power under the Constitution to extend.[illegible] The application of the "political question" doctrine was briefly reviewed above and the same cases and analysis apply here. As to the second aspect, it was argued that inasmuch as *Dillon v. Glass* had recognized that the fixing of a reasonable time was Congress' and that Congress could fix the time either in advance or at some later point, based upon its evaluation of the social and other bases of the necessities of the amendment, Congress did not do violence to the Constitution when, even having fixed the time, it subsequently extended the time. Proponents recognized that if the time limit was fixed in the body of the amendment Congress could not alter it because the time limit as well as the substantive provisions of the proposal had been subject to ratification by a number of States, making it unalterable by Congress except through the amending process again.[illegible] Opponents argued that Congress, having by a two-thirds vote sent the amendment and its authorizing resolution to the States, had put the matter beyond changing by passage of a simple resolution, that States had either acted upon the entire package or at least that they had or could have acted affirmatively upon the premise of Congress that if the amendment had not been ratified within the prescribed period it would expire and their assent would not be compelled for longer than they had intended.

In any event, the resolution was adopted and we may anticipate, certainly in the event 38 States act affirmatively and perhaps even in the absence of 38 ratifications, that the argument will be pursued in court and out.

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[illegible] See *Equal Rights Amendment Extension*, Hearings before the Senate Judiciary Subcommittee on the Constitution, 95th Congress, 2d sess. (1978). Subsidiary arguments included the question whether Congress could act by majority vote or had to agree by two-thirds and whether the extension resolution had to be presented to the President.

[illegible] Congress first included a time limitation on an amendment in the Eighteenth, including it in the text of the amendment. See *Dillon v. Gloss*, 256 U.S. 368, 372-373 (1921). No time limitation accompanied the proposal of the Nineteenth but seven-year periods were included in the texts of the Twentieth through the Twenty-second; apparently concluding in proposing the Twenty-third and all subsequent amendments that putting the time limit in the text merely cluttered up the amendment, Congress began placing it in the authorizing resolution.

# ARTICLE VI—NATIONAL SUPREMACY

## [P. 869, add to N. 2:]

And see, e.g., *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976).

## [P. 869, add to N. 4:]

And see *State Dept. of Social Services* v. *Dublino*, 413 U.S. 405 (1973); *Philpott* v. *Welfare Board*, 409 U.S. 413 (1973); *Shea* v. *Vialpando*, 416 U.S. 251 (1974); *Lascaris* v. *Shirley*, 420 U.S. 730 (1975); *Van Lare* v. *Hurley*, 421 U.S. 338 (1975); *Philbrook* v. *Glodgett*, 421 U.S. 707 (1975); *Jones* v. *T.H.* 425 U.S. 986 (1976). See also *Burns* v. *Alcala*, 420 U.S. 575 (1975). Similarly, federal standards prevail in educational assistance programs. *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Wheeler* v. *Barrera*, 417 U.S. 402 (1974). In *Wheeler*, however, while the federal law required certain undertakings it expressly did not override state constitutional provisions relating to public assistance to parochial schools. Id., 415–419.

## [P. 873, in text following sentence in which N. 9 appears, add:]

However, the Court has recently revived part of this state police power limitation upon the exercise of delegated federal power in a closely divided decision that furnishes little guidance for future conduct.[1.5] Following the demise of the "doctrine of dual federalism" in the 1930's, the Court confronted the question whether Congress had the power to regulate state conduct and activities to the same extent, primarily under the commerce clause, as it did to regulate private conduct and activities to the exclusion of state law. In *United States* v. *California*,[2.5] upholding the validity of the application of a federal safety law to a state-owned railroad being operated as a non-profit entity, the Court, speaking through Justice Stone, denied the existence of an implied limitation upon Congress' "plenary power to regulate commerce" when a state instrumentality was involved. "The state can no more deny the power if its exercise has been authorized by Congress than can an individual." While the State in operating the

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[1.5] *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). The Court's opinion was by Justice Rehnquist and was joined by Chief Justice Burger and Justices Stewart, Blackmun, and Powell. Justice Blackmun submitted also a limiting concurring opinion. Id. 856. Dissenting were Justices Brennan, White, and Marshall, and, in a separate opinion, Justice Stevens. On the "doctrine of dual federalism" discussed in the text of the main volume, see the commentary by the originator of the phrase, Professor Corwin. E. Corwin, *The Twilight of the Supreme Court—A History of Our Constitutional Theory* (Yale: 1934), 1051; *The Commerce Power Versus States Rights* (Princeton: 1936), 115–172; *A Constitution of Powers in a Secular State* (Charlottesville: 1951), 1–28.

[2.5] 297 U.S. 175 (1936).

railroad was acting as a sovereign and within the powers reserved to the States, the Court said, its exercise was "in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution." [3.5] A series of cases followed in which the Court refused to construct any state immunity from regulation when Congress acted pursuant to a delegated power.[4.5] The culmination of this series had been thought to be ***Maryland*** **v.** ***Wirtz*** [5.5] in which the Court upheld the constitutionality of applying the federal wage and hour law to nonprofessional employees of state-operated schools and hospitals. In an opinion by Justice Harlan, the Court saw a clear connection between working conditions in these institutions and interstate commerce. Labor conditions in schools and hospitals affect commerce; strikes and work stoppages involving such employees interrupt and burden the flow of goods purchased by state agencies across state lines and the wages paid have a substantial effect. The commerce clause being thus applicable, the Justice wrote, Congress was not constitutionally required to "yield to state sovereignty in the performance of governmental functions. This argument simply is not tenable. There is no general 'doctrine implied in the Federal Constitution that "the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other."' . . . [I]t is clear that the Federal Government when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character . . . . [V]alid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." [6.5]

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[3.5] Id., 183–185.

[4.5] *California* v. *United States*, 320 U.S. 577 (1944) (federal regulation of shipping terminal facilities owned by State); *California* v. *Taylor*, 353 U.S. 553 (1957) (Railway Labor Act applies on state-owned railroad); *Case* v. *Bowles*, 327 U.S. 92 (1946); *Hubler* v. *Twin Falls County*, 327 U.S. 103 (1946) (federal wartime price regulations applied to state transactions; Congress' power effectively to wage war); *Board of Trustees* v. *United States*, 289 U.S. 48 (1933) (State university required to pay federal customs duties on imported educational equipment); *Oklahoma ex rel. Phillips* v. *Atkinson Co.*, 313 U.S. 508 (1941) (federal condemnation of state lands for flood control project); *Sanitary District* v. *United States*, 266 U.S. 405 (1925) (prohibition of State from diverting water from Great Lakes).

[5.5] 392 U.S. 183 (1968), Justices Douglas and Stewart dissented. Id., 201.

[6.5] Id., 195, 196–197.

*Wirtz* was specifically reaffirmed in *Fry* v. *United States* [7.5] in which the Court upheld the constitutionality of presidentially imposed wage and salary controls, pursuant to congressional statute, on all state governmental employees. In dissent, however, Justice Rehnquist propounded a doctrine which was to obtain majority approval in *League of Cities*.[8.5] In that opinion, he said for the Court: "[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." [9.5] The standard, apparently, in judging between permissible and impermissible federal regulation is whether there is federal interference with "functions essential to separate and independent existence." [10.5] In the context of this case, state decisions with respect to the pay of their employees and the hours to be worked were essential aspects of their "freedom to structure integral operations in areas of traditional governmental functions." [11.5] The line of cases, exemplified by *United States* v. *California*, was distinguished and preserved on the basis that the state activities there regulated were so unlike the traditional activities of a State that Congress could reach them; [12.5] *Case* v. *Bowles* was held distinguishable on the basis that Congress had acted pursuant to its war powers and to have rejected the power would have impaired national defense; [13.5] *Fry* was distinguished on the bases that

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[7.5] 421 U.S. 542 (1975).

[8.5] Id. 549. Essentially, the Justice was required to establish an affirmative constitutional barrier to congressional action. Id., 552–553. That is, if one asserts only the absence of congressional authority, one's chances of success are dim because of the breadth of the commerce power. But when he asserts that, say, the First or Fifth Amendment bars congressional action concededly within its commerce power, one interposes an affirmative constitutional defense that has a chance of success. It was the Justice's view that the State was "asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority." Id., 553. But whence the affirmative barrier? "[I]t is not the Tenth Amendment *by its terms*. . . ." Id., 557 (emphasis supplied). Rather, the Amendment was an example of the Framers' understanding that the sovereignty of the States imposed an implied affirmative barrier to the assertion of otherwise valid congressional powers. Id., 557–559. But the difficulty with this construction is that the equivalence sought to be established by Justice Rehnquist lies *not* between an individual asserting a constitutional limit on delegated powers and a State asserting the same thing but *is* rather between an individual asserting a lack of authority and a State asserting a lack of authority; this equivalence is evident on the face of the Tenth Amendment which states that the powers not delegated to the United Staes "are reserved to the States respectively, *or to the people*." (emphasis supplied). The States are thereby accorded no greater interest in restraining the exercise of nondelegated power than are the people. See *Massachusetts* v. *Mellon*, 262 U.S. 447 (1923).

[9.5] *National League of Cities* v. *Usery*, 426 U.S. 833, 845 (1976).

[10.5] Ibid.

[11.5] Id., 852.

[12.5] Id., 854.

[13.5] Id., 854n, 18.

it was emergency legislation tailored to combat a serious national emergency, the means were limited in time and effect, the freeze did not displace state discretion in structuring operations or force a restructuring, and, the federal action "operated to reduce the pressure upon state budgets rather than increase them."[14.5] *Wirtz* was overruled; it permitted Congress to intrude into the conduct of integral and traditional state governmental functions and could not therefore stand.[15.5]

How much of a restriction upon congressional power *League of Cities* may prove to be is difficult to measure. It leaves first of all a great area of state conduct subject to federal regulation when the State is conducting a business operation, activities not like "traditional government activities." Second, when Congress acts in an emergency or pursuant to its war powers it may apparently reach even "traditional governmental activities", at least for limited periods. But may it reach "traditional governmental activities" not involving employer-employee relations, a sphere that occasioned a lengthy discussion by the Court of the burden imposed on state discretion in determining pay and hours? May it reach even these relations when it operates "to reduce the pressures upon state budgets rather than increase them", i.e., to reduce pay rather than increase it?[16.5] The doctrinal theme of the opinion is absolutist but its accommodation of precedent weakens the theme.[17.5] But the greatest weakening occurs in Justice Blackmun's one-paragraph concurrence in which he suggests his lack of agreement with "certain possible implications" of the opinion and recasts it as a "balancing approach" which "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed fed-

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[14.5] Id., 852–853.

[15.5] Id., 853–855. Reserved was the question whether different results would obtain if Congress acted under its Fourteenth Amendment enforcement powers or pursuant to its power to condition federal spending. A different result is reached with respect to legislation under the Fourteenth (and presumably the Thirteenth and Fifteenth). *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976); *Hutto* v. *Finney*, 437 U.S. 678 (1978); *Maher* v. *Gagne*, 448 U.S. 122 (1980). The Court has not resolved the spending clause issue but the lower courts have held it to be unaffected by *League of Cities*. E.g., *North Carolina ex rel. Morrow* v. *Califano*, 445 F. Supp. 532 (E.D. N. C. 1977), *aff'd.*, 435 U.S. 962 (1978); *New Hampshire* v. *Marshall*, 616 F. 2d 240 (C.A. 1, 1980).

[16.5] The question is suggested by a series of cases in which the Court has relaxed constitutional restrictions upon governmental discretion in dealing with public employees. E.g., *Kelley* v. *Johnson*, 425 U.S. 238 (1976); *Bishop* v. *Wood.*, 426 U.S. 341 (1976); *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976). Cf. *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). But see *Branti* v. *Finkel*, 445 U.S. 507 (1980).

[17.5] A great part of the necessity of accommodation arises because of the Court's decision in *Fry*, from which the author of the *League of Cities* opinion dissented.

eral standards would be essential."[19.5] It remains to be seen whether *League of Cities* becomes settled constitutional doctrine or whether it too succumbs to the fate of the cases so long controverted in the "dual federalism" dispute.

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[19.5] Id., 426 U.S. 856. Elucidation of the meaning of the decision had been expected when the Court reviewed regulations issued under the Clean Air Act which mandated certain actions by the States and imposed penalties for failure to act, but the regulations were withdrawn and the cases were remanded. *EPA* v. *Brown*, 431 U.S. 99 (1977). See also *Massachusetts* v. *United States*, 435 U.S. 444 (1978); *City of LaFayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum*, 445 U.S. 97 (1980); *United States* v. *Gillock*, 445 U.S. 360 (1980), for intimations. While some lower courts have sought constitutional foundations for such regulations as the Equal Pay Act and the Age Discrimination in Employment Act in the Fourteenth Amendment to guard them against *League of Cities* attack, other courts have applied the Blackmun balancing test and found them valid commerce clause regulations not impermissibly interfering with state discretion. See *Marshall* v. *City of Sheboygan*, 577 F. 2d 1 (C.A. 7, 1978); *Pearce* v. *Wichita County*, 590 F. 2d 128 (C.A. 5, 1979). See also *Peel* v. *Florida Dept. of Transportation*, 600 F. 2d 1070 (C.A. 5, 1979) (veterans' assistance enacted under war powers).

## Federal Exemption From State Taxes

### [P. 883, add to N. 24:]

The cases were reaffirmed and applied in *United States* v. *County of Fresno*, 429 U.S. 452 (1977), in which the Court upheld a tax imposed on the possessory interests of United States Forest Service employees in housing located in national forests within the county and owned and supplied to the employees by the Forest Service as part of their compensation. A State or local government may raise revenues on the basis of property owned by the United States as long as it is the possession or use by the private citizen that is being taxed.

### [P. 883, add to N. 25:]

See also *United States* v. *Mississippi Tax Comm.*, 412 U.S. 363 (1973); *United States* v. *Mississippi Tax Comm.*, 421 U.S. 599 (1975).

### [P. 887, add to N. 24:]

See also *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 150–155 (1973); *McClanahan* v. *Arizona Tax Comm.*, 411 U.S. 164, 169–170 (1973); *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 475–479 (1976).

# AMENDMENTS—BILL OF RIGHTS

**[P. 907, add to N. 29:]**

The Court continues to apply the rule that a Bill of Rights provision held binding on the States through the Fourteenth Amendment means the same as it does when it restrains the Federal Government. In *Crist* v. *Bretz*, 437 U.S. 28 (1978), after determining that a particular aspect of double jeopardy jurisprudence was of constitutional basis, rather than merely an aspect of the Court's supervisory jurisdiction over the inferior federal courts, it was deemed axiomatic that the same rule governed the States. Even as a constitutional rule, however, it was still inquired into whether the rule was "at the core" of the double jeopardy clause. Id., 37–38. Justices Powell and Rehnquist and Chief Justice Burger dissented, both with respect to the constitutional status of the rule and to its application to the States even if it were constitutional. Id., 39, 40. Note, however, that after hearing argument once in the case, the Court had requested reargument on its own motion, requesting the parties to consider the constitutional nature of the rule and whether a different rule might be mandated by the Constitution. Id., 434 U.S. 980 (1977). Justice Marshall's unusual dissent to this order appeared to anticipate a relaxation of the rule much as that which occurred in the jury cases.

In light of Justice Powell's dissent in *Bretz*, see his opinion for the Court, which the Chief Justice joined, in *First National Bank* v. *Bellotti*, 435 U.S. 765, 780 n. 16 (1978), in which he observed that "the States do not have greater latitude than Congress to abridge freedom of speech. The dissenting opinion of *Mr. Justice Rehnquist*, *post*, at 822, is predicated on the view that the First Amendment has only a 'limited application . . . to the States.' . . . Although advanced forcefully by Mr. Justice Jackson in 1952 [citing *Beauharnais*], and repeated by Mr. Justice Harlan in 1957 [citing *Roth*], this view has never been accepted by any majority of this Court." At least with respect to the First Amendment, then, it appears that only Justice Rehnquist among the present Members of the Court would not accord it the same meaning regardless of the federal or state context in which it is applied. See also *Buckley* v. *Valeo*, 424 U.S. 1, 290 (1976) (Justice Rehnquist concurring in part and dissenting in part).

## Religion—Neutrality

**[P. 936, in text following N. 25, add:]**

Flux appears to marks the Court's previously well settled approach to resolution of church property disputes. The rule with respect to hierarchical churches had appeared to be one of mandatory deference to the decision of the body within the church authorized to reach a decision, if to proceed otherwise would require a court to inquire into ecclesiastical matters, into doctrinal disputes, in order to resolve a question. Language in those cases had suggested that a court confronted with a church property dispute could apply "neutral principles of law, developed for use in all property disputes," when to do so would not require them to decide doctrinal issues; in other words, deference when the First Amendment would be violated by independent review, application of neutral principles when review was possible of nonecclesiastical grounds of dispute.[1.5] However, the Court viewed strictly the limits of the inquiry a court might make, holding that an argument over a matter of internal church government, the power to reorganize the dioceses of a hierarchical church in this country, was "at the core of ecclesiastical affairs" and a court could not interpret the church constitution to make an independent determination of the power but must defer to the interpretation of the body authorized to decide.[2.5] In *Jones* v. *Wolf*,[3.5] a divided Court while formally adhering to the principles stated above appeared to depart in substance from their application.

A schism developed in a local church which was a member of a hierarchical church and the majority voted to withdraw from the general church. The proper authority of the general church determined that the minority constituted the "true congregation" of the local church

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[1.5] *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969); *Maryland and Virginia Eldership of the Churches of God* v. *Church of God of Sharpsburg*, 396 U.S. 367, 368 (1970); id., 368–370 (Justice Brennan concurring) (courts may use deference, neutral principles, or neutrally-constructed state statutes so long as they do not consider doctrinal matters).

[2.5] *The Serbian Eastern Orthodox Diocese* v. *Dionisije Milivojevich*, 426 U.S. 696, 720–725 (1976). This case also disapproved the "arbitrariness" exception to deference formulated in *Gonzalez*; that is, courts may not inquire whether the decisions of the authorized church body comply with church laws and regulations. It reserved decision on the "fraud" and "collusion" exceptions. Id., 708–720.

[3.5] 443 U.S. 595 (1979). In the majority were Justices Blackmun, Brennan, Marshall, Rehnquist, and Stevens. Dissenting were Justices Powell, Stewart, White, and Chief Justice Burger.

and awarded them authority over it. The Court approved the approach of the state court in applying neutral principles by examining the deeds to the church property, state statutes, and provisions of the general church's constitution concerning ownership and control of church property in order to determine that no language of trust in favor of the general church was contained in any of them and that the property thus belonged to the local congregation.[4.5] Further, the Court held, the First Amendment did not prevent the state court from applying a presumption of majority rule to award control to the majority of the local congregation, provided that it permitted defeasance of the presumption upon a showing that the identity of the local church is to be determined by some other means as expressed perhaps in the general church charter.[5.5] The dissent argued that to permit a court narrowly to view only the church documents relating to property ownership permitted the ignoring of the fact that the dispute was over ecclesiastical matters and that the general church had decided which faction of the congregation was the local church.[6.5]

Thus, it is unclear where the Court is on this issue. *Jones* continues to state that it is improper to review an ecclesiastical dispute and that deference is required in those cases, but by approving a neutral principles inquiry which can filter out in effect the doctrinal issues underlying a church dispute the Court seems to have approved at least an indirect limitation of the authority of hierarchical churches.[7.5]

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[4.5] Id., 602–606.

[5.5] Id., 606–610. Because it was unclear whether the state court had applied such a rule and applied it properly, the Court remanded.

[6.5] Id., 610.

[7.5] The Court indicated that the general church could always expressly provide in its charter or in deeds to property the proper disposition of disputed property. But here the general church had decided which faction was the "true congregation" which would appear to constitute as definitive a rule as the Court's suggestion. Id., 606.

## Establishment of Religion—Financial Assistance to Church-Related Institutions

### [P. 918, add to N. 9:]

*Allen* was reaffirmed in *Meek* v. *Pittenger*, 421 U.S. 349, 359–372 (1975), and *Wolman* v. *Walter*, 433 U.S. 229, 236–238 (1977), although largely on the basis of adherence to precedent. Justices Brennan, Marshall, and Stevens would overrule *Allen* and void textbook programs. Id., 255, 256, 264.

### [P. 919, add to N. 14:]

*Lemon* v. *Kurtzman*, 411 U.S. 192 (1973), held that the State was not precluded from reimbursing schools for expenses incurred in reliance on the voided program up to the date the Supreme Court held the statute unconstitutional. But see *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977).

**[P. 929, following the final paragraph of the subsection, add:]**

The discretion of state and federal governments to assist financially sectarian elementary and secondary schools remains quite circumscribed, although the most recent decisions do evince a judicial attitude to permit some limited public assistance to such schools in contexts in which the religious missions of those schools may be only marginally served; at the same time, the Court's prior disposition to allow a greater discretion when colleges affiliated with religious institutions are aided has been reaffirmed. Moreover, these decisions reveal a deep division of opinion among the Justices upon the application of the three-part test developed in past litigation to provide "helpful signposts" [1.5] in the resolution of concrete controversies.[2.5]

A secular purpose is the first requirement to sustain the validity of legislation touching upon religion and upon this standard the Justices display little disagreement. State desire to preserve a healthy and safe educational environment for all of its school children, state interest in promoting pluralism and diversity among its public and nonpublic schools, and state concern to prevent an overburdening of the public school system that would accompany the financial failure of private schools provide adequate legitimate, non-sectarian bases for legislation to assist nonpublic, religious schools.[3.5]

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[1.5] *Hunt* v. *McNair*, 412 U.S. 734, 741 (1973). *See text, pp. 913–915.* These tests are at best "guidelines" rather than a "constitutional caliper"; they must be used to consider "the cumulative criteria developed over many years and applying to a wide range of governmental action. . . ." Inevitably, "no 'bright line' guidance is afforded." *Tilton* v. *Richardson*, 403 U. S. 672, 677–678 (1971); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U. S. 756, 761 & n. 5, 773 n. 31 (1973); *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U. S. 646, 662 (1980), and id., 663 (Justice Black dissenting).

[2.5] Eight of the sitting Justices adhere to the tests, *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U. S. 646, 653 (1980), and id., 665 (dissenting opinion), while dividing with respect to application. Justice Blackmun describes the Court as being comprised of Justices (1) who perceive no barrier under the Constitution to almost any aid a legislature sees fit to provide, (2) who perceive a broad barrier to aid of almost any kind, and (3) who occupy a centrist position barring some aid and validating other kinds. Id., 663–664 (dissenting). While the first and second groups are not wholly united in their internal views, it is the third group which creates the uncertainty with respect to a range of forms of assistance. Justice Stevens, a member of group (2), is the lone Justice who would abandon the tests and adopt a "no aid" position. Id., 671 (dissenting); *Wolman* v. *Walter*, 433 U. S. 229, 264 (1977) (dissenting).

[3.5] *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 773 (1973). See also id., 805 (Chief Justice Burger dissenting), 812–813 (Justice Rehnquist dissenting), 813 (Justice White dissenting). And see *Wolman* v. *Walter*, 433 U.S. 229, 240 (1977) (plurality opinion); *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U. S. 646, 653–654 (1980), and id., 665 (dissenting opinion).

Upon the tests of secular primary effect [4.5] and church-state entanglement, however, varied views have been expressed by the Justices. As to the former test, the Court has formulated no hard-and fast standard permitting easy judgment in all cases. In providing assistance, government must avoid aiding directly or indirectly the religious mission of such schools; thus, funds may not be given to an institution that would, for example, defray the costs of building or maintaining chapels or classrooms in which religion is taught.[5.5] Even in the provision of secular services in religious schools, intruded into the function the possibility that religious instruction might be introduced into the class is sufficient to condemn a program.[6.5] The extent to which the religious mission of the entity is inextricably intertwined with the secular mission and the size of the assistance furnished are factors for the reviewing court to consider.[7.5] But the fact that public aid to further secular purposes of the school will necessarily "free up" some of the institution's funds which it may apply to its religious mission is not alone sufficient to condemn the program.[8.5] Rather, it must always be determined whether the religious effects are substantial or whether they are remote and incidental.[9.5] Upon that determination and upon

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[4.5] Aside from the other arguments, Justice White has argued that the primary effect test requires the Court to make an "ultimate judgment" whether *the* primary effect of a program advances religion. If the primary effect is secular, i.e., keeping the parochial school system alive and providing adequate secular education to substantial numbers of students, then the incidental benefit to religion was only secondary and permissible. *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 822–824 (1973) (dissenting). The Court responded that "[o]ur cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion." Id., 783 n. 39.

[5.5] Id., 774–780; *Meek* v. *Pittenger*, 421 U.S. 349, 362–366 (1975); Wolman v. *Walter*, 433 U.S. 229, 248–251 (1977).

[6.5] Compare *Meek* v. *Pittenger*, 421 U.S. 349, 367–372 (1975), with Wolman v. *Walter*, 433 U.S. 229, 238–248 (1977) and *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 654–657 (1980).

[7.5] The existence of what the Court perceived to be massive aid and of religion-pervasive recipients constituted a major backdrop in *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), and *Meek* v. *Pittenger*, 421 U.S. 349 (1973). When the aid is more selective and its permissible use is cabined sufficiently, the character of the institution assumes less importance. *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 661–662 (1980). When the entity is an institution of higher education, the Court appears less concerned with its religious character but it still evaluates the degree to which it is pervasively sectarian. *Hunt* v. *McNair*, 413 U.S. 734 (1973); *Roemer* v. *Maryland Public Works Bd.*, 426 U.S. 736 (1976).

[8.5] *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 658–659 (1980).

[9.5] The form which the assistance takes may have little to do with the determination. One group of Justices has argued that when the assistance is given to parents, the dangers of impermissible primary effect and entanglement are avoided and it should be approved. *Committee for Public Education and Religious* the guarantees built into any program to assure that public aid is used exclusively for secular, neutral, and nonideological purposes rest the issue of the validity of public assistance.

The greater the necessity of policing the entity's use of public funds to ensure secular effect the greater danger of impermissible entanglement of government with religious matters. Any scheme that requires detailed and continuing oversight of the schools and that includes entity reporting to and justification to public authority has this potential and an aid program may founder on it.[10.5] However, where the nature of the assistance is such that furthering of the religious mission is unlikely and the public oversight is concomitantly less intrusive, a review process may be sustained.[11.5]

Thus, government aid which is directed toward furthering secular interests in the welfare of the child or the nonreligious functions of the entity will generally be permitted where the entity is not so pervasively religious that secular and sectarian activities may not be separated and the latter denied more than incidental benefit or the requisite policing to ensure no sectarian benefit is not excessively entangling. But no mere statement of rules can adequately survey the cases.

Substantial unanimity, at least in result, has prevailed among the Justices in dealing with direct financial assistance to sectarian schools, as might have been expected from the argument over the primary effect test. A state program to reimburse nonpublic schools for a variety of services mandated by state law was voided because the statute did not distinguish between services, some secular and some potentially religious, the costs of which would be reimbursed.[12.5] Similarly, a program

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*Liberty* v. *Nyquist*, 413 U.S. 756, 801–805 (1973) (dissenting). The Court denied a controlling significance to delivery of funds to parents rather than schools; government must always ensure a secular use. Id., 780. Another group of Justices has argued that the primary effect test does not permit direct financial support to sectarian schools, *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 665–669 (1980) (dissenting), but the Court held that provision of direct aid with adequate assurances of nonreligious use does not constitute a forbidden primary effect. Id., 661–662.

[10.5] *Meek* v. *Pittenger*, 421 U.S. 349, 367–372 (1975); *Wolman* v. *Walter*, 433 U.S. 229, 254–255 (1977). Another aspect of entanglement identified by the Court is the danger that an aid program would encourage continuing political strife through disputes over annual appropriations and enlargements of programs. *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 794–798 (1973); *Meek* v. *Pittenger*, *supra*, 372. This concern appears to have lessened somewhat in more recent cases. *Roemer* v. *Maryland Public Works Board*, 426 U.S. 736, 763–766 (1976); *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 661 n. 8 (1980).

[11.5] Id., 659–661; *Wolman* v. *Walter*, 433 U.S. 229, 240–241, 242–244, 248 (1977).

[12.5] *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973). Only Justice White dissented. Id., 482. Among the services reimbursed was the cost of preparing and grading examinations in the nonpublic school by the teachers there. In *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977), the Court struck down a new statutory program entitling private schools to obtain reimbursement for expenses incurred during the school year in which the prior program was voided in *Levitt*.

of direct money grants to nonpublic schools to be used for the maintenance of school facilities and equipment failed to survive the primary effect test because it did not restrict payment to those expenditures related to the upkeep of facilities used exclusively for secular purposes and because "within the context of these religion-oriented institutions" the Court could not see how such restrictions could effectively be imposed.[13.5] But a plan of direct monetary grants to nonpublic schools to reimburse them for the costs of state-mandated record-keeping and of administering and grading state-prepared tests and which contained safeguards against religious utilization of the tests was sustained even though the Court recognized the incidental benefit to the schools.[14.5]

Two programs of assistance through provision of equipment and services to private, including sectarian, schools were invalidated in *Meek* v. *Pittenger*.[15.5] First, the loan of instructional material and equipment directly to qualifying nonpublic elementary and secondary schools was voided as an impermissible extension of assistance to religion. This conclusion was reached on the basis that 75 percent of the qualifying schools were church-related or religiously affiliated educational institutions and the assistance was available without regard to the degree of religious activity of the schools. The materials and equipment loaned were religiously neutral, but the substantial assistance necessarily constituted aid to the sectarian school enterprise as a whole and thus had a primary effect of advancing religion.[16.5] Second, the provision of auxiliary services—remedial and accelerated instruction, guidance counseling and testing, speech and hearing services—by public employees on nonpublic school premises was invalidated because the Court thought the program had to be policed closely to ensure religious neutrality and it saw no way that could be done without impermissible entanglement. The fact that the teachers would, under this program and unlike one of the programs condemned in *Lemon* v. *Kurtzman*, be public employees rather than employees of the religious schools and possibly under religious discipline was insufficient to per-

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[13.5] *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 774-780 (1973). Chief Justice Burger and Justice Rehnquist concurred in this part of the opinion, Id., 798, and Justice White dissented. Id., 820.

[14.5] *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646 (1980). Justices Blackmun, Brennan, Marshall, and Stevens dissented. Id., 662, 671. The dissenters thought the case different from precedents in its authorization of direct reimbursement grants whereas previously approved plans had merely relieved the private schools of the costs of preparing and grading state-prepared tests. See *Wolman* v. *Walter*, 433 U.S. 229, 238-241 (1977).

[15.5] 421 U.S. 349 (1975). Chief Justice Burger and Justices Rehnquist and White dissented. Id., 385, 387.

[16.5] Id., 362-366. See also *Wolman* v. *Walter*, 433 U.S. 229, 248-251 (1977). The Court in *Committee for Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 661-662 (1980), held that *Meek* did not forbid all aid that benefited religious-pervasive schools to some extent, so long as it was conferred in such a way as to prevent any appreciable risk of being used to transmit or teach religious views. See also *Wolman* v. *Walter*, *supra*, 262 (Justice Powell).

mit the State to fail to make certain that religion was not inculcated by subsidized teachers.[17.5]

The "child benefit" theory under which it is permissible for government to render assistance and services to pupils in sectarian schools without being deemed to be aiding the religious mission of the schools so long as the service and assistance are themselves ideological neutral has not proved easy of application. In *Wolman* v. *Walter*,[19.5] the Court approved a program in which the State supplied standardized tests and scoring services used in the public schools, with nonpublic school personnel not involved in the test drafting or scoring, speech, hearing, and psychological diagnostic services provided in the private schools by public employees, and therapeutic, guidance, and remedial services for students provided off the premises of the private schools. In all these, the Court thought the program contained adequate built-in protections against religious utilization. But while the Court adheres to its ruling permitting the States to loan secular textbooks used in the public schools to pupils attending religious schools,[20.5] it has declined to extend the precedent to permit the loan to pupil or their parents of instructional materials and equipment, such as projectors, tape recorders, maps, globes, and science kits, although they were identical to those used in the public schools.[20.6] Nor was a State permitted to expend funds to pay the costs to religious schools of field trip transportation such as was provided to public school students.[21.5]

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[17.5] Id., 421 U.S., 367-372. But see Wolman v. Walter, 433 U.S. 229, 238-248 (1977).

[19.5] Ibid. The Court deemed the situation in which these services were performed and the nature of the services to occasion little danger of aiding religious functions and thus occasioning little supervision giving rise to entanglement. All the services fell "within that class of general welfare services for children that may be provided by the States regardless of the incidental benefit that accrues to church-related schools." Id., 243, quoting *Meek* v. *Pittenger*, 421 U.S. 349, 371 n. 21 (1975). Justice Brennan would have voided all the programs because, considered as a whole, the amount of assistance was so large as to constitute assistance to the religious mission of the schools. Id., 433 U.S. 255; Justice Marshall would have approved only the diagnostic services, id., 256; and Justice Stevens would generally approve closely administered public health-type services. Id., 264.

[20.5] *Meek* v. *Pittenger*, 421 U.S. 349, 359-372 (1975); *Wolman* v. *Walter*, 433 U.S. 229, 236-238 (1977). *Allen* was explained as resting on "the unique presumption" that "the educational content of textbooks is something that can be ascertained in advance and cannot be diverted to sectarian uses. Id., 251 n. 18. There was "a tension" between *Nyquist*, *Meek*, and *Wolman*, on the one hand, and *Allen* on the other, and *Allen* was to be followed "as a matter of *stare decisis*" but the "presumption of neutrality" embodied in *Allen* would not be extended to other similar assistance, ibid, as Chief Justice Burger and Justices White and Rehnquist would do. Id., 255. See also *Committee For Public Education and Religious Liberty* v. *Regan*, 444 U.S. 646, 649-650 (1980), and *Wolman* v. *Walter*, 433 U.S. 229, 262-264 (1977) (Justice Powell).

[20.6] Wolman v. Walter, 433 U.S. 229, 248-251 (1977).

[21.5] Id., 252-255. Justice Powell joined the three dissenters who would have approved this expenditure. Id., 262.

Substantially similar tuition reimbursement programs from New York and Pennsylvania were struck down. New York's program provided out of general tax revenues reimbursements for tuition paid by low-income parents to send their children to nonpublic elementary and secondary schools; the reimbursements were of fixed amounts but could not exceed 50 percent of actual tuition paid. Pennsylvania provided fixed-sum reimbursement for parents who send their children to nonpublic elementary and secondary schools, so long as the amount paid did not exceed actual tuition, the funds to be derived from cigarette tax revenues. Both programs, it was held, constituted public financial assistance to sectarian institutions with no attempt to segregate the benefits so that religious activities did no receive any.[20.7]

New York had also enacted a program of tax relief for those parents sending their children to nonpublic schools; relief was available to parents not qualifying for the tuition reimbursements so long as they made less than $25,000 per year and the relief was in the form of fixed sums bearing no relationship to the amounts of tuition paid. "In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition grant allowed under § 2. The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that '[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education.'"[20.8] Some difficulty, however, was experienced in distinguishing this program from the tax exemption approved in *Walz*.[20.9]

Two subsidiary arguments were rejected by the Court in these cases. First, it had been argued that the tuition reimbursement program promoted the free exercise of religion in that it permitted low-income parents desiring to send their children to school in accordance with their religious views to do so. The Court agreed that "tension inevitably exists between the Free Exercise and the establishment

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[20.7] *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 780-789 (1973); *Sloan* v. *Lemon*, 413 U.S. 825 (1973). The Court distinguished *Everson* and *Allen* from the present programs on the grounds that in those cases the aid was given to all children and their parents and that the aid was in any event religiously neutral, so that any assistance to religion was purely incidental. Id., 781-782. Chief Justice Burger thought that *Everson* and *Allen* were controlling. Id., 798.

[20.8] *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756, 789-794 (1973). The quoted paragraph is id. 790-791.

[20.9] *Id.*, 791-794. Principally, *Walz* was said to be different because of the age of exemption there dealt with, the fact that it was granted in the spirit of neutrality while the tax credit under consideration was not, and the fact that the *Walz* exemption promoted less entanglement while the credit would promote more.

Clauses", but government is required to neither advance nor inhibit religion and the tuition program inescapably advanced religion and must fall[25.5] In the Pennsylvania case, it was argued that because the program reimbursed parents who sent their children to nonsectarian schools as well as to sectarian ones the portion respecting the former parents was valid and "parents of children who attended sectarian schools are entitled to the same aid as a matter of equal protection. The argument is thoroughly spurious. . . . The Equal Protection Clause has never been regarded as a bludgeon with which to compel a State to violate other provisions of the Constitution."[1.5]

Sustained was a South Carolina program under which institutions of higher education could enter into contracts with a state authority by which the authority would issue revenue bonds for construction of projects on an institution's campus, thus affording a college a better arrangement in terms of interest costs than it could make otherwise, and the authority would hold formal title to the project. The principal of and the interest on the bonds as well as the expenses of the authority would be paid by the college. The Court did not decide whether this special form of assistance could be otherwise sustained, because it concluded that religion was neither advanced nor inhibited nor was there any impermissible public entanglement. "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting."[2.5] The colleges involved, though they were affiliated with religious institutions, were not shown to be permeated with religion as to fall under the former clause—no religious test existed for faculty or student body, a substantial part of the student body was not of the religion of the affiliation—and state law precluded the use of any project financed under it for religious activities.[3.5]

The kind of assistance permitted by *Tilton* and by *Hunt* v. *McNair* seems to have been broadened when the Court sustained a Maryland

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[25.5] Id., 788–789.

[1.5] *Sloan* v. *Lemon*, 413 U.S. 825, 833–835 (1973). In any event, the Court sustained the District Court's refusal to sever the program and save that portion as to children attending non-sectarian schools on the basis that since so large a portion of the children benefitting attending religious schools it could not be assumed the legislature would have itself enacted such a limited program.

In *Wheeler* v. *Barrera*, 417 U.S. 402 (1974), the Court held that States receiving federal educational funds were required by federal law to provide "comparable" but not equal services to both public and private school students within the restraints imposed by state constitutional restrictions on aid to religious schools. In the absence of specific plans, the Court declined to review First Amendment limitations on such services.

[2.5] *Hunt* v. *McNoil*, 413 U.S. 734, 743 (1973).

[3.5] Id., 739–740, 741–745. Justices Brennan, Douglas and Marshall, dissenting, rejected the distinction between elementary and secondary education and higher education and foresaw a greater danger of entanglement than did the Court. Id., 749.

program of annual subsidies to qualifying private institutions of higher education; the grants were noncategorical but could not be used for sectarian purposes, a limitation to be policed by the administering agency.[4.5] The plurality opinion found a secular purpose, it found that the religious affiliated institutions were not so pervasively sectarian that secular activites could not be separated from sectarian ones and therefore the limitation of funding to secular activities was meaningful,[5.5] and it thought the character of the institutions aided as not pervasively sectarian reduced the degree of public surveillance required to police the use of the funds to such an extent that excessive entanglement was improbable. The annual nature of the subsidy was a problem but the plurality thought that the generally secular character of the institutions, again, permitted the relationship between the public agency and the recipient institution occasioned by annual grants and that there was much less likelihood of political divisiveness in controversies over annual funding because the student body was not local but diverse, because large numbers of non-religious affiliated institutions received aid, and because the affiliated colleges were not closely tied to their respective churches.[6.5]

## Free Exercise of Religion

### [P. 934, add to No. 11:]

In *McDaniel* v. *Paty*, 435 U.S. 618, 633 n. 6 (1978) (concurring opinion), Justice Brennan stated that "[c]andor compels the acknowledgment that to the extent that *Braunfeld* conflicts with *Sherbert* in this regard, it was overruled." The "in this regard" refers to the governmental imposition of adherence to religious practice and belief or access to a benefit or relief from a burden.

### [P. 935, in text following N. 18, add:]

Unanimously, but with great differences of approach, the Court declared invalid a Tennessee statute, once common in the States but

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[4.5] *Roemer* v. *Maryland Public Works Bd.*, 426 U.S. 736 (1976). The opinion of the Court by Justice Blackmun was joined only by Chief Justice Burger and Justice Powell. Justices White and Rehnquist concurred on the basis of secular purpose and no primary religious benefit, rejecting entanglement. Id., 767. Justices Brennan and Marshall dissented and Justices Stewart and Stevens separately dissented. Id., 770, 773, 775.

[5.5] Id. 755. In some of the schools mandatory religion courses were taught, the significant factor in Justice Stewart's view. Id., 773, but overweighed by other factors in the plurality's view.

[6.5] Id., 765–766. A still further broadening of governmental power to extend aid affecting religious institutions of higher education may be discerned in the Court's summary affirmance of two lower-court decisions upholding programs of assistance—scholarships and tuitions grants—to students at college and university as well as vocational programs in both public and private—including religious—institutions; one of the programs contained no secular use restriction at all and in the other one the restriction seemed somewhat pro forma. *Smith* v. *Bd. of Govrs. of Univ. of North Carolina*, 434 U.S. 803 (1977), *aff'g* 429 F. Supp. 871 (D.C.W.D.N.C. 1977); *Americans United* v. *Blanton*, 434 U.S. 803 (1977), *aff'g* 433 F. Supp. 97 (D.C.M.D. Tenn. 1977).

now restricted to this one State, barring ministers and priests from service in a specially called state constitutional convention and inferentially indicated the invalidity of the state constitutional provision barring ministers and priests from service as legislators.[1.5]

## Expression

### [P. 941, following N. 23 in text, add:]

Confronting directly a question not heretofore addressed, the Court has held that corporations are entitled to assert First Amendment guarantees against federal and, through the Fourteenth Amendment, state regulations.[1.5] The question, the Court wrote, is not what constitutional rights corporations have but whether the speech which is being restricted is expression that the First Amendment protects because of its societal significance. Because the speech concerned the enunciation of views of the conduct of governmental affairs, it was protected regardless of its source. "The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[2.5] And nothing in the corporate organization of a "speaker" entitles a separation out of rights generally accorded; while the First Amendment protects and fosters individual self-expression as a worthy goal, it also and as important affords the public access to discussion, debate, and the dissemination of information and ideas. While some restraint on expression may be permissible under some

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[1.5] *McDaniel* v. *Paty*, 435 U.S. 618 (1978). The plurality opinion by Chief Justice Burger, joined by Justices Powell, Rehnquist, and Stevens, found the case governed by *Sherbert* as requiring strict scrutiny of governmental restrictions upon the free exercise of one's religion. The State had failed to show that its view of the dangers of clergy participation in the political process had any vitality, *Torcaso* v. *Watkins* was distinquished because the State was acting on the status of being a clergyman rather than on one's beliefs. Justice Brennan, joined by Justice Marshall, found *Torcaso* controlling because imposing a restriction upon one's status as a religious person did penalize his religious belief, his freedom to profess or practice that belief. Id., 629, Justice Stewart also found *Torcaso* dispositive, id., 642, and Justice White found an equal protection violation because of the restraint upon seeking political office.

[1.5] *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978). The decision was 5-to-4. Justice Rehnquist would have recognized no protected First Amendment right of corporations on the basis that as creatures entirely the creation of state law they were not to be accorded rights enjoyed by natural persons. Id., 822. Justices White, Brennan, and Marshall thought the First Amendment implicated but not dispositive because of the state interests asserted. Id., 802. Previous decisions recognizing corporate free speech had either involved press corporations, id., 781–783; and see id., 795 (Chief Justice Burger concurring), or corporations organized especially to promote the ideological and associational interests of their members. E.g., *NAACP* v. *Button*, 371 U.S. 415 (1963).

[2.5] Id., 435 U.S., 777.

circumstances, it must survive "exacting scrutiny" before the Court and corporate speech is entitled to the same scrutiny.[3.5]

Debate within the Court on this issue of corporate First Amendment protection also highlights an issue much mooted in the law journals[4.5] in recent years and now addressed in several instances by the Court,[5.5] whether the "institutional press" because of its express mention in the First Amendment may assert or be entitled to greater freedom from government regulation or restrictions than non-press individuals, groups, or associations, and whether the press may not in fact be able to demand some affirmative consideration from government in order to carry out its mission. The answer to the latter question appears to be firmly negative whereas the former question may be too crudely formulated to elicit the degree of freedom which the press has.

Chief Justice Burger has written that "[t]he Court has not yet squarely resolved whether the Press Clause confers upon the 'institutionalized press' any freedom from governmental restraint not enjoyed by all others."[6.5] Justice Stewart on the other hand argued: "That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society. The Constitution requires sensitivity to that role, and to the special needs of the press in performing it effectively."[7.5]

Several Court holdings do firmly point to the conclusion that the press clause does not confer on the press the power to compel government to furnish information or to give the press access to information that the public generally does not have.[8.5] Nor in many respects is the press entitled to treatment different in kind than the treatment any

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[3.5] Id., 783, 786–788. Corporate speech may not be confined to specified issues, such as the referendum issue involved in *Bellotti*. Commercial speech when engaged in by a corporation is subjected to the same standards of protection as when natural persons engage in it. *Consolidated Edison Co.* v. *Public Service Comm.*, 447 U.S. 530, 533–535 (1980). Nor does the status of a corporation as a government regulated monopoly alter the matter. Ibid., n. 1; *Central Hudson Gas & Electric Co.* v. *Public Service Comm.*, 447 U.S. 557, 566–568 (1980).

[4.5] Justice Stewart apparently began the debate in Stewart, "Or of the Press," 26 Hastings L. J. 631 (1975). Other articles are cited in *First National Bank* v. *Bellotti*, 435 U.S. 765, 795, 798 and n. 3 (1978) (Chief Justice Burger concurring).

[5.5] E.g., *Houchins* v. *KQED*, 438 U.S. 1 (1978); *Zurcher* v. *Stanford Daily* 436 U.S. 547 (1978); *Saxbe* v. *Washington Post*, 417 U.S. 843 (1974); *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). See *First National Bank* v. *Bellotti*, 435 U.S. 765, 795 (Chief Justice Burger concurring).

[6.5] Id., 798 (concurring opinion).

[7.5] *Houchins* v. *KQED*, 438 U.S. 1, 17 (1978) (Justice Stewart concurring).

[8.5] *Houchins* v. *KQED*, 438 U.S. 1 (1978), and id., 16 (Justice Stewart concurring); *Saxbe* v. *Washington Post*, 417 U.S. 843 (1974); *Pell* v. *Procunier*, 417 U.S. 817). *Richmond Newspapers* v. *Virginia*, 448 U.S. 555 (1980), whatever it may precisely mean, recognizes a right of access of both public and press to trials.

other member of the public may be subjected to.[9.5] Yet it does seem clear that to some extent the press, because of the role it plays in keeping the public informed and in the dissemination of news and information, is entitled to particular if not special deference that others are not similarly entitled to, that its role constitutionally entitles it to governmental "sensitivity", to use Justice Stewart's word.[10.5] To what degree of difference in the decision of controversies such a recognized "sensitivity" might contribute is difficult to say [11.5] but the dispute among the Justices seems far from over.

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[9.5] *Branzburg* v. *Hayes*, 408 U.S. 665 (1972); *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978); *Herbert* v. *Lando*, 441 U.S. 153 (1979).

[10.5] E.g., *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241 (1974); *Landmark Communications* v. *Virginia*, 435 U.S. 829 (1978). Justice White's opinion in *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 563–567 (1978), contains language cognizant of the need for care when the press is involved and Justice Powell's concurrence is express in this respect. Id., 568. See also *Branzburg* v. *Hayes*, 408 U.S. 665, 709 (1972) (Justice Powell concurring). Several concurring opinions in *Richmond Newspapers* v. *Virginia*, 448 U.S. 555 (1980), imply recognition of some right of the press to gather information that apparently may not be wholly inhibited by nondiscriminatory constraints. Id., 582–584 (Justice Stevens), 586 n. 2 (Justice Brennan), 599 n. 2 (Justice Stewart).

[11.5] The most interesting possibility is in the area of First Amendment protection of good faith defamation. *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1954), *Text*., pp. 1002–1007. Justice Stewart maintains that *Sullivan* is exclusively a free press case, denying that the "constitutional theory of free speech gives an individual any immunity from liability for libel or slander." "Or of the Press," 26 Hastings L. J. 631, 633–635 (1975). Some think they discern in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), intimations of such learnings of the Court. In *Hutchinson* v. *Proxmire*, 443 U.S. 111, 133 n. 16 (1979), the Court notes that it has never decided whether the *Times* standard applies to an individual defendant.

## Prior Restraint

### [P. 943, add to N. 13:]

The same issues were raised in *United States* v. *Progressive*, 467 F. Supp. 990 (D.C.W.D.Wis. 1979), in which the United States obtained an injunction prohibiting publication of an article it claimed would reveal information that by enabling countries not possessing nuclear weapons to make more rapid advances in developing them would impair national security through its contribution to nuclear proliferation. The injunction was lifted when the same information was published elsewhere and thus no appellate review was had of the order.

With respect to the right of the Central Intelligence Agency to prepublication review of the writings of former agents and its enforcement through contractual relationships, see *Snepp* v. *United States*, 444 U.S. 507 (1980); *Alfred A. Knopf* v. *Colby*, 509 F. 2d 1362 (C.A. 4), *cert. den.*, 421 U.S. 992 (1975); *United States* v. *Marchetti*, 466 F. 2d 1309 (C.A. 4), *cert. den.*, 409 U.S. 1063 (1972).

### [P. 943, in text following paragraph with N. 13, add:]

Confronting a claimed conflict between the free press and fair trial guarantees, the Court unanimously set aside a state court injunction barring the publication of information that might prejudice the subsequent trial of a criminal defendant.[1.5] Though agreed on result, the Justices were divided with respect to whether "gag orders" were ever permissible and if so what the standards for imposing them were. The opinion of the Court utilized the Learned Hand formulation of the "clear and present danger" test [2.5] and considered as factors in any decision on the imposition of a restraint upon press reporters (a) the nature and extent of pretrial news coverage, (b) whether other measures were likely to mitigate the harm, and (c) how effectively a restraining order would operate to prevent the threatened danger.[3.5] One seeking a restraining order would have a heavy burden to meet to justify such an action, a burden that could be satisfied only on a showing that without a prior restraint a fair trail would be denied, but the Chief Justice refused to rule out the possibility of showing the kind of threat that would possess the degree of certainty to justify restraint.[4.5] Justice Brennan's major concurring opinion flatly took the position that such restraining orders were never permissible. Commentary and reporting on the criminal justice system is at the core of First Amendment values, he would hold, and secrecy can do so much harm "that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained." [5.5] The extremely narrow exceptions under which prior restraints might be

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[1.5] *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539 (1976).

[2.5] Id., 562, quoting *Dennis* v. *United States*, 183 F. 2d 201, 212 (C.A. 2, 1950), *aff'd.*, 341 U.S. 494, 510 (1951). See *text*, pp. 952–953.

[3.5] *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 562 (1976). Opinion of Chief Justice Burger, concurred in by Justices Blackmun and Rehnquist, and, also writing brief concurrences, Justices White and Powell. Applying the tests, the Chief Justice agreed that (a) there was intense and pervasive pretrial publicity and more could be expected, but that (b) the lower courts had made little effort to assess the prospects of other methods of preventing or mitigating the effects of such publicity and that (c) in any event the restraining order was unlikely to have the desired effect of protecting the defendant's rights. Id, 562–567.

[4.5] The Court differentiated between two kinds of information, however: (1) reporting on judicial proceedings held in public which has "special" protection and requires a much higher justification than (2) reporting of information gained from other sources as to which the burden of justifying restraint is still high. Id., 567–568, 570. See also *Oklahoma Pub. Co.* v. *District Court*, 430 U.S. 308 (1977) (setting aside injunction restraining news media from publishing name of juvenile involved in pending proceeding when name has been learned at open detention hearing that could have been closed but was not); *Smith* v. *Daily Mail Pub., Co.*, 433 U.S. 97 (1979).

[5.5] Id., 427 U.S. 527, 588. Justices Stewart and Marshall joined this opinion and Justice Stevens noted his general agreement except that he reserved decision in particularly egregious situations, even though stating that he might well agree with Justice Brennan there also. Id., 617. Justice White, while joining the opinion of the Court, noted that he had grave doubt that "gag orders" could ever be justified but he would refrain from so declaring in the Court's first case on the issue. Id., 570.

permissible relate to probable national harm resulting from publication, the Justice continued; because the trial court could adequately protect a defendant's right to a fair trial through other means even if there were conflict of constitutional rights the possibility of damage to the fair trial right would be so speculative that the burden of justification could not be met.[6.5] While the result does not foreclose the possibility of future "gag orders," it does lessen the number to be expected and shifts the focus to other alternatives for protecting trial rights.[7.5]

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[6.5] Id., 588–595.

[7.5] One such alternative is the banning of communication on trial issues by prosecution and defense attorneys, police officials, and court officers with the press. This of course also raises First Amendment issues. E.g., *Chicago Council of Lawyers* v. *Bauer*, 522 F. 2d 242 (C.A. 7, 1975), *cert. den.*, 427 U.S. 912 (1976).

**[P. 944, add to N. 18:]**

These standards were reiterated and applied in *Southeastern Promotions* v. *Conrad*, 420 U.S. 546 (1975), in which the Court, reserving the question whether public exhibition of the musical "Hair" was within one of the narrowly defined exception to the prohibition against prior restraints, held that in any event a city's manager of its municipal auditorium failed to observe the appropriate and necessary procedural safeguards when it rejected a request to permit the exhibition of "Hair" in the auditorium. The opinion was by Justice Blackmun and was dissented from by Chief Justice Burger and Justices White and Rehnquist. Id., 564, 570. See also *Erznozik* v. *City of Jacksonville*, 422 U.S. 205 (1975). But in *Young* v. *American Mini Theatres*, 527 U.S. 50 (1976), the Court, in an opinion by Justice Stevens, held that a zoning ordinance, providing that an adult theater may not, without a special waiver, be located within 1000 feet of any two other such theaters or within 500 feet of a residential area, was not an impermissible prior restraint. Justices Stewart, Brennan, Marshall, and Blackmun dissented. Id., 84, 88.

The necessity of immediate appellate review of orders restraining the exercise of First Amendment rights was strongly emphasized in *National Socialist Party* v. *Village of Skokie*, 432 U.S. 43 (1977), and seems to explain the Court's action in *Philadelphia Newspapers* v. *Jerome*, 434 U.S. 241 (1978). But see *Moreland* v. *Sprecher*, 443 U.S. 709 (1979) (party can relinquish right to expedited review through failure to properly request it.)

## Subsequent Punishment: Standards

**[P. 952, add to N. 16:]**

These cases were reviewed in *Landmark Communications* v. *Virginia*, 435 U.S. 829, 842–845 (1978), although the Court "question[ed] the relevance" of the clear and present danger standard in that case. Rejecting the state court's view that when the legislature made its own determination of the existence of clear and present danger courts were to defer, the Court ascribed to courts the duty to go behind the legislative determination and "to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." Id., 843.

### [P. 953, add to N. 22:]

Note the recurrence to the Learned Hand formulation in *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 562 (1976), although the court appears in fact to apply balancing.

### [P. 960, add to N. 15:]

Recent successful vagueness attacks on laws were *Smith* v. *Goguen*, 415 U.S. 566 (1974) (flag desecration law); *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974) (punishment of opprobrious words); *Hynes* v. *Mayor of Oradell*, 425 U.S. 610 (1976) (restrictions on door-to-door canvassing). Attack failed in *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973) (Hatch Act); *Parker* v. *Levy*, 417 U.S. 733 (1974) (sections of military justice law); *Buckley* v. *Valeo*, 424 U.S. 1, 70–82 (1976) (portion of campaign finance law).

But see *Young* v. *American Mini Theatres*, 427 U.S. 50, 60 (1976), for an apparent narrowing of standing to assert vagueness when one is clearly within a valid proscription and the law's deterrent effect on legitimate expression is not "both real and substantial" and if the law is "readily subject to a narrowing construction by the state courts", the doctrine previously applied to overbreadth attacks.

### [P. 960, add to N. 17:]

In *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), a 5-to-4 decision, the Court curbed its use of the doctrine in cases involving "speech-plus," noting "that facial overbreadth adjudication is an exception to our traditional overbreadth adjudication," and holding that where conduct and not merely speech is concerned "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." Id., 615. The opinion of the Court and Justice Brennan's dissent, id., 621, contain extensive discussion of the doctrine. Other restrictive decisions on overbreadth are *Arnett* v. *Kennedy*, 416 U.S. 134, 158–164 (1974), and *Parker* v. *Levy*, 417 U.S. 733, 757–761 (1974). But the doctrine continues to be used across a wide spectrum of First Amendment cases. *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974); *Bigelow* v. *Virginia*, 421 U.S. 809, 815–818 (1975); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975); *Doran* v. *Salem Inn*, 422 U.S. 922, 932–934 (1975); *Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 633–639 (1980). Overbreadth doctrine is not available in commercial speech cases. *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 381 (1977).

### [P. 963, add to N. 10:]

See also *Fields* v. *Askew*, 279 So. 2d 822 (Fla. 1973), *aff'd per curiam*, 414 U.S. 1148 (1974), upholding an affirmative loyalty oath as a qualification for registering to vote.

## Freedom of Belief

### [P. 963, add to N. 9:]

*Barnette* was the focus of the Court's decsion in *Wooley* v. *Maynard*, 430 U.S. 705 (1977), voiding the compulsion under state law of motorists displaying on their auto license plates of the motto "Live Free or Die." A Jehovah's Witness who objected to being required to display the motto was held protected by the

First Amendment which, in addition to protecting the right to speak, also protects the right to refrain from speaking at all. In the absence of a state countervailing interest of sufficient magnitude, one may not be compelled to display on his private property a message making an ideological statement. Justices Rehnquist and Blackman dissented. Id., 719, Compare *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 85–88 (1980), and id. 96 (Justice Powell).

## Right of Association

### [P. 966, add to N. 4:]

But the major expansion of the right of association has occurred in the context of political rights. "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom" *Kusper* v. *Pontikes*, 414 U.S 51, 56–57 (1973) (voiding a restrictive voter qualification requirement) See also *American Party of Texas* v. *White*, 415 U.S. 767 (1974) (passing on ballot access restriction); *Cousins* v. *Wigoda*, 419 US.477 (1975) (state injunction interfering with party process of determining composition of its national convention violated First and Fourteenth Amendments); *Buckley* v. *Valeo*, 414 U.S. 1 (1976) (evaluating, and voiding some, federal campaign law provisions limiting and regulating political contributions and expenditures and requiring extensive disclosure); *Elrod* v. *Burns*, 427 U.S. 347 (1976) (patronage system). But see *Marchioro* v. *Chany*, 442 U.S. 191 (1979) (regulation sustained; no substantial burden).

### [P. 967, in text following N. 11, add:]

But provisions of the Federal Election Campaign Act requiring the reporting and disclosure of contributions and expenditures to and by political organizations, including the maintenance by such organizations of records of everyone contributing more than $10 and the reporting by individuals and groups that are not candidates or political committees who contribute or expend more than $100 a year for the purpose of advocating the election or defeat of an identified candidate, were sustained.[1.5] "[C]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment. . . . We long have recognized the significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. . . . We have required that the subordinating interests of the State must survive exacting scrutiny. We have also insisted that there be a "relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." [2.5] The governmental interests effectuated by these requirements were found to be of sufficient magnitude to be validated even though they might incidentally deter some persons from contributing.[3.5] A claim that contributions to minor parties and independents should have a blanket exemption from disclosure was rejected inas-

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[1.5] *Buckley* v. *Valeo*, 424 U.S. 1, 60–84 (1976).

[2.5] Id., 64 (footnote citations omitted).

[3.5] The governmental interests are set out in id., 66–68.

much as an injury was highly speculative; but any such party making a showing of a reasonable probability that compelled disclosure of contributors' names would subject them to threats or reprisals could obtain an exemption from the courts.[4.5]

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[4.5] Id., 68–74. The Court narrowly construed the requirement of reporting independent contributions and expenditures in order to avoid constructional problems, Id., 74–84.

**[P. 968, add to N. 13:]**

*Button* was applied in *In re Primus*, 436 U.S. 412 (1978), in which a volunteer lawyer for the American Civil Liberties Union had been disciplined by a state bar for soliciting someone to utilize the ACLU to bring suit to contest the sterilization of Medicaid recipients. The discipline was found to be foreclosed by the First Amendment. Both the NAACP, involved in *Button*, and the ACLU were organizations that engaged in extensive litigation as well as in lobbying and educational activities in which all the efforts, including the litigative were means of political expression and association. "[T]he efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants." Id., 431. Thus, state restrictions on solicitation for this purpose encountered strict scrutiny.

**[P. 968, add to N. 17:]**

These cases were found inapplicable in *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 458–459 & n. 16 (1978). While *Button* and the union solicitation cases focused greatly on the institutional interest in using law to pursue political and social objectives, "[u]nderlying them was the Court's concern that the aggrieved receive information regarding their legal rights and the means of enforcing them. This concern applies with at least as much force to aggrieved individuals as it does to groups." *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 376 n. 32 (1977). Although the Court noted that Ohralik provided the persons he solicited "with information aobut his or her legal rights and remedies", it clearly felt his actions were merely "bait" to obtain employment and were unprotected. Id., 436 U.S., 458.

**[P. 968, add to N. 19:]**

An association right to involvement in electoral activity is a substantial factor in judging state laws restricting access to the electoral process. *Kusper* v. *Pontikes*, 414 U.S. 51, 56–57 (1973); *American Party of Texas* v. *White*, 415 U.S. 767, 780 (1974).

**[P. 969 in text following paragraph with N. 19, add:]**

A significant extension of First Amendment association rights in the political context occurred when the Court curtailed the already limited political patronage system. At first holding that a nonpolicy making, nonconfidential government employee cannot be discharged from a job that he is satisfactorily performing upon the sole ground of his political beliefs or affiliations,[1.5] the Court subsequently held that "the question is whether the hiring authority can demonstrate

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[1.5] *Elrod* v. *Burns*, 427 U.S. 347 (1976). The limited concurrence of Justices Stewart and Blackmun provided the qualification for an otherwise expansive plurality opinion. Id., 374.

that party affiliation is an appropriate requirement for the effective performance of the public office involved." [2.5] The concept of policymaking, confidential positions was abandoned, the Court noting that some such prositions would nonetheless be protected whereas some people filling positions not reached by the description would not be.[3.5] The opinion of the court makes difficult an evaluation of the ramifications of the decision, but it seems clear that a majority of the Justices adhere to a doctrine of broad associational political freedom that will have substantial implications for governmental employment.

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[2.5] *Branti* v. *Finkel*, 445 U.S. 507, 518 (1980). On the same page, the Court refers to a position in which "party membership was *essential* to a discharge of the employee's governmental responsibilities." Ibid (emphasis supplied). A great gulf separates "appropriate" from "essential" descriptively, so that much depends on the question whether the Court was using the two words as interchangeables or whether the stronger word was meant to characterize the position noted and not to particularize the standard.

[3.5] Justice Powell's dissents in both cases contain lengthy treatments of and defenses of the patronage system as a glue strengthening necessary political parties. Id., 520.

**[P. 970, after paragraph in which N. 25 appears, add:]**

In *Abood* v. *Detroit Bd. of Education*,[1.5] the Court dealt in a public employment context with the issues raised by *Hanson* and *Street*, the permissibility under the First Amendment of a system of compelled support of unions by employees and the permissibility of union expenditures of funds so collected for political and social purposes not directly related to collective bargaining. Recognizing that employee associational rights were clearly restricted by any system of compelled support, because the employees had a right not to associate, not to support, the Court nonetheless found the governmental interest served by the agency shop provision—the promotion of labor peace and stability of employer-employee relations—to be of overriding importance and to justify the impact upon employe freedom.[2.5] But a different balance was drawn when the Court considered whether employees compelled to support the union were constitutionally entitled to object to the use of those exacted funds to support political candidates or to advance ideological causes not germane to the union's duties as collec-

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[1.5] 431 U.S. 209 (1977). That a public entity was the employer and the employees consequently were public employees was deemed constitutionally immaterial for the application of the principles of *Hanson* and *Street*, id., 226–232, but Justice Powell found the distinction between public and private employment crucial. Id., 244.

[2.5] Id., 217–223. The compelled support was through the agency shop device. Id., 211, 217 n. 10. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, would have held that compelled support by public employees of unions violated their First Amendment rights. Id., 244. For an argument over the issue of corporate political contributions and shareholder rights, see *First National Bank* v. *Bellotti*, 435 U.S. 765, 792–795 (1978), and Id., 802, 812–821 (Justice White dissenting).

tive-bargaining representative. To compel one to expend funds in such a way is to violate his freedom of belief and the right to act on those beliefs just as much as if government prohibited him from acting to further his own beliefs.[3.5] However, the remedy was not to restrain the union from making non-collective bargaining related expenditures but to require that those funds come only from employees who do not object. Therefore, the lower courts were directed to oversee development of a system whereby employees could object generally to such use of union funds and could obtain either a proportionate refund or reduction of future exactions.[4.5]

On a related matter, the Court held that a labor relations body could not prevent a union member or employee represented exclusively by a union from speaking out at a public meeting on an issue of public concern, simply because the issue was a subject of collective bargaining between the union and the employer.[5.5]

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[3.5] Id., 431 U.S., 232–237.

[4.5] Id., 237–242. Justice Stevens suggested that remedies might have to be stronger, id., 244, and Justice Powell did not think the remedy adequate to redress even the violation found by the Court. Id., 263–264.

[5.5] *Madison School Dist.* v. *WERC*, 429 U.S. 167 (1977).

## National Security and First Amendment

**[P. 978, add to N. 12:]**

*In Indiana Communist Party* v. *Whitcomb*, 414 U.S. 411 (1974), a requirement that parties and candidates seeking ballot space must subscribe to an oath that they do not "advocate the overthrow of local, state or national government by force or violence" was voided because the language of the oath did not comport with the advocacy standards of *Brandenburg* v. *Ohio*, *text*, pp. 961–962. Four Justices concurred, however, id., 451, on narrower grounds, their opinion containing a hint that they might not subscribe to the opinion of the Court on the merits. Id., 452 n. 3. See also *Whitcomb* v. *Communist Party of Indiana*, 410 U.S. 976 (1973) (summarily affirming lower court invalidation of ballot access oath that party is not affiliated with nor does it cooperate with a foreign government or foreign political party).

## Government as Employer: Political Activities

**[P. 986, in text following N. 8, add:]**

In *Civil Service Commission* v. *National Association of Letter Carriers*,[1.5] the Court sustained the Hatch Act against First Amendment vagueness and overbreadth attack. Preliminarily, the Court reaffirmed its prior holding inn *United Public Workers* v. *Mitchell*,[2.5] that

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[1.5] 413 U.S. 548 (1973). Justices Douglas, Brennan, and Marshall dissented Id., 595. In *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), the Court refused to consider overbreadth attacks on a state statute of much greater coverage because the litigants had engaged in conduct that the statute could constitutionally proscribe.

[2.5] 330 U.S. 75 (1947).

the interest of the Government in forbidding partisan political activities by its employees was so substantial that it overrode the rights of those employees to engage in political activities and association;[3.5] therefore, a statute which barred in plain language a long list of activities would be cleanly valid.[4.5] The issue in *Letter Carriers*, however, was whether the language Congress, did enact, forbidding employees to take "an active part in political management or in political campaigns," was unconstitutional on its face, either because the statute was too imprecise to allow government employees to determine what was forbidden and what was permitted or because the statute swept in under its coverage conduct that Congress could not forbid as well as conduct subject to prohibition or regulation. In respect to vagueness, plaintiffs contended and the lower court had held that the quoted proscription was inadequate to provide sufficient guidance and that the only further elucidation Congress had provided was to enact that the forbiden activities were the same activities which the Commission had as of 1940, and reaching back to 1883, "determined are at the time of the passage of this act prohibited on the part of employees . . . . by the provisions of the civil-service rules. . . ." This language had been included, it was contended, to deprive the Commission of power to alter thousands of rulings made by it which were not available to employees and which were in any event mutually inconsistent and too broad.

The Court held, on the contrary, that Congress had intended to confine the Commission to the boundaries of its rulings as of 1940 but had further intended the Commission by a process of case-by-case adjudication to flesh out the prohibition and to give content to it. That the Commission had done and it had regularly summarized the rules which it followed in understandable terms and it was authorized as well to issue advisory opinions to employees uncertain of the propriety of contemplated conduct. "[T]here are limitations in the English language with respect to being both specific and manageably brief," said the Court, but it thought the prohibitions as elaborated in Commission regulations and rulings were "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interests."[5.5] There were conflicts, the Court conceded, between some of the things forbidden and some of the protected expressive activities, but these were at most marginal. Thus, some conduct arguably protected did under some circumstances so partake of partisan activities

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[3.5] The interests recognized by the Court as served by the proscription on partisan activities were (1) the interest in the efficient and fair operation of governmental activities and the appearance of such operation, (2) the interest in fair elections, and (3) the interest in protecting employees from improper political influences. 413 U.S., 557–567.

[4.5] Id., 556.

[5.5] Id., 578–579.

as to be properly proscribable. But the Court would not invalidate the entire statute for this degree of overbbreadth.[6.5]

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[6.5] Id., 580-581. On overbreadth, see *text*, pp. 960-961 and *supra*, p. S104. As First Amendment limitations on the spoils system itself, see *Elrod* v. *Burns*, 427 U. S. 347 (1976), and *Branti* v. *Finkel*, 445 U. S. 507 (1980). And see *Abood* v. *Detroit Bd. of Education*, 431 U. S. 209 (1977).

## Government as Employer: Free Expression Generally

### [P. 988, add to N. 14:]

Government may impose reasonable restrictions on employee activity that in other contexts might be protected by the First Amendment. *Snepp* v. *United States*, 444 U. S. 507, 509 n. 3 (1980) (even in absence of contract, governmental interest in secrecy of information important to national security and in appearance of confidentiality essential to effective operation of foreign intelligence would provide justification for acting against divulging employee).

### [P. 989, add to N. 17:]

*Pickering* was extended to private communications of an employee's views to the employer in *Givhan* v. *Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979), although the Court recognized that different considerations might arise from the context. That is, with respect to public speech, *content* is likely to be determinative, whereas in private speech, *manner*, *time*, and *place of delivery* may be as important as content and perhaps more important. In *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274 (1977), the Court held that a finding that protected speech or conduct played a substantial part in the decision to dismiss does not conclude the case; the employer may show by a preponderance of the evidence that the same decision to dismiss would have been reached in the absence of the protected speech or conduct.

### [P. 989, in text following N. 17, add:]

Following the analysis of *Letter Carriers*, the Court sustained the constitutionality of a provision of federal law authorizing removal or suspension without pay "for such cause as will promote the efficiency of the service" when the "cause" cited concerned speech by the employee.[7.5] The employee had charged that his superiors had made an offer of a bride to a private person. The quoted phrase, the Court held, "is without doubt intended to authorize dismissal for speech as well as other conduct." But the authority conferred was not impermissibly vague inasmuch as it is not possible to encompass within a statutory enactment all the myriad different situations that arise in the course of employment and the language used was informed by developed principles of agency adjudication coupled with a procedure for obtaining legal counsel from the agency on the interpretation of the law.[8.5] Neither was the language overbroad, held the Court, because it "proscribes only that public speech which improp-

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[7.5] *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). Justice Douglas, Brennan, and Marshall dissented. Id. 203, 206. The language quoted is from 5 U.S.C. § 7501 (a).

[8.5] 416 U.S. 134, 158-164.

erly damages and impairs the reputation and efficiency of the employing agency, and it thus imposes not greater controls on the behavior of federal employees than are necessary for the protection of the Government as an employer. . . . We hold that the language 'such cause as will promote the efficiency of the service' in the Act excludes constitutionally protected speech, and that the statute is therefore not overbroad."[9.5]

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[9.5] Id., 162. In dissent, Justice Marshall argued: "The Court's answer is no answer at all. To accept this response is functionally to eliminate overbreadth from the First Amendment lexicon. No statute con reach and punish constitutionally protected speech. The majority has not given the statute a limiting construction but merely repeated the obvious." Id., 229.

**[P. 991, add to N. 1:]**

See also *Papish* v. *Board of Curators*, 410 U.S. 667 (1973); *Jacobs* v. *Board of School Comrs.*, 490 F. 2d 601 (C.A. 7, 1973), *aff'g* 349 F. Supp. 605 (D.C.S.D. Ind., 1972), *vacated as moot*, 420 U.S. 128 (1975); *Bazaar* v. *Fortune*, 476 F. 2d 570 (C.A. 5), *modified en banc*, 489 F. 2d 225 (C.A. 5, 1973), *cert. den.* 416 U.S. 995 (1974). Cf. *Eisner* v. *Stamford Board of Educ.* 440 F. 2d 803 (C.A. 2, 1971).

### Government as Regulator of Elections

**[P. 992, in text following N. 6, add:]**

By enactments in 1971 and 1974, Congress imposed new and stringent regulation of and limitations on contributions to and expenditures by political campaigns, as well as disclosure of most contributions and expenditures,[1.5] setting the stage for a landmark Supreme Court decision probing the scope of protection afforded political activities by the First Amendment.[2.5] In basic unanimity, but with several Justices feeling that sustained provision trenched on protected expression, the Court sustained the contribution and disclosure sections of the statute but voided the limitations on expenditures.

"Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. . . . A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[3.5] The expenditure of money in political campaigns may involve speech alone, conduct alone, or mixed speech-conduct, the Court noted, but all forms of it involve communication and when governmental regulation is aimed directly at suppressing communication it matters not how that communi-

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[1.5] Federal Election Campaign Act of 1971, 86 Stat. 3, as amended by the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263, 2 U.S.C. § 431 et seq., and sections of Titles 18 and 26.

[2.5] *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

[3.5] Id., 14, 19.

cation is defined. As such, the regulation must be subjected to close scrutiny and justified by compelling governmental interests. When this process was engaged in, the contribution limitations, with some construed exceptions, survived, but the expenditure limitation did not.

The contribution limitation was sustanied as imposing only a marginal restriction upon the contributor's ability to engage in free communication inasmuch as the contribution is a generalized expression of support for a candidate but it is not a communication of reasons for the support; "the size of the contribution provides a very rough index of the intensity of the contributors support for the candidate." [4.5] The political expression that is really involved is when the funds are spent by a candidate and only if the restrictions were set so low as to impede this communication would there arise a constitutional infringement. This incidental restraint upon expression may therefore be justified by Congress' purpose to limit the actuality and appearance of corruption resulting from large individual financial contributions.[5.5]

Of considerable importance to the analysis of the validity of the limitations on contributions was the Court's conclusion voiding a section restricting to $1,000 a year the aggregate expenditure anyone could expend to advocate the election or defeat of a "clearly identified candidate." Though the Court treated the spending limited as purely an expenditure, it seems to partake equally of the nature of a contribution on behalf of a candidate that is not given to the candidate but that is spent on his behalf. "Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." [6.5] The Court found that none of the justifications offered in support of a restriction on such expression was adequate: independent expenditures did not appear to pose the dangers of corruption that contributions did and it was an impermissible purpose to attempt to equalize the ability of some individuals and groups to express themselves by restricting the speech of other individuals and groups.[7.5]

Similarly, limitations upon the amount of funds a candidate could spend out of his own resources or those of his immediate family were voided. A candidate, no less than any other person, has a First Amendment right to advocate.[8.5] The limitations upon total expenditures by

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[4.5] Id., 21.

[5.5] Id., 14–38. Chief Justice Burger and Justice Blackmun would have struck down the contribution limitations. Id., 235, 241–246, 290.

[6.5] Id., 48.

[7.5] Id., 39–51. Justice White would have sustained all the expenditure limitations. Id., 257. It should be noted that in sustaining the public financing provisions the Court agreed that Congress could condition receipt of public funds upon acceptance of expenditure limitations. Id. 108–109.

[8.5] Id., 51–54. Justice Marshall joined White in disagreeing with this part of the decision. Id., 286.

candidates seeking nomination or election to federal office could not be justified: the evil associated with dependence on large contributions was met by limitations on contributions, the purpose of equalizing candidate financial resources were impermissible, and the First Amendment did not permit government to determine that expenditures for advocacy were excessive or wasteful.[9.5]

Nor did state restrictinos upon the expenditure of corporate funds in referenda, except with respect to proposals that materially affected corporate business, property, or assets, survive Court scrutiny.[10.5] The free discussion of governmental affairs "is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual." The "materially affecting" requirement was found to be an impermissible proscription of speech based on content and identity of interests. The "exacting scrutiny" that restrictions on speech much pass found inadequate all justifications offered for the restriction and the Court found some of them impermissible justifications in any event.[11.5]

### [P. 992, add to N. 7:]

See also *Vanasco* v. *Schwartz*, 401 Supp. 87 (D.C.E.D.N.Y. 1975), *aff'd*. 423 U.S. 1041 (1976) statute barring malicious, scurrilous, and false and misleading campaign literature is unconstitutionally overbroad) And note the limitations imposed on state regulation by *Cousins* v. *Wigoda*, 419 U.S. 477 (1975).

### [P. 989, add to N. 18:]

In a different but related context, the government's power over military personnel has been held to extend to curbing of expression that would violate the First Amendment were it applied to civilians. *Brown* v. *Glines*, 444 U.S. 348 (1980); *Greer* v. *Spock*, 424 U.S. 828 (1976).

## Government as Regulator of Labor Relations

### [P. 994, add to N. 16:]

For recent constitutional developments in this area, see *Abood* v. *Detroit Bd. of Education*, 431 U.S. 209 (1977); *Madison School Dist.* v. *WERC*, 429 U.S. 167 (1976); *Babbitt* v. *United Farm Workers*, 442 U.S. 289 (1979). On the discretion government has in dealing with its internal labor relations, see *Smith* v.

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[9.5] Id., 54–59. The reporting and disclosure requirements were sustained. Id., 60–84. See *supra, p. S103*.

[10.5] *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978). Justice Powell wrote the opinion of the Court. Dissenting, Justices White, Brennan, and Marshall argued that while corporations were entitled to First Amendment protection more regulation was permissible than when individuals were involved and that substantial state interests supported the restrictions. Id., 802. Justice Rehnquist went further in dissent, not finding corporate constitutional protection. Id., 822.

[11.5] Protection of individual political access in political affairs and prevention of corruption was a great interest but not shown to be endangered by corporate expenditures in referenda. Protection of dissenting stockholders was found not served by the restriction. Id., 786–795.

*Arkansas State Highway Employees*, 441 U.S. 463 (1979). The Court has recently narrowly construed statutes regulating labor relations in sensitive areas. E.g., *NLRB* v. *Yeshiva Univ.*, 444 U.S. 672 (1980) (faculty collective bargaining in private universities); *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979) (collective bargaining in religious schools).

## Government as Investigator

### [P. 995, add to N. 23:]

The courts continue to construe *Branzburg* as recognizing a limited privilege which must be balanced against other interests. See *In re Pennington*, 224 Kan. 573, 581 P. 2d 812 (1978), *cert. den.*, 440 U.S. 929 (1979); *Riley* v. *City of Chester*, 612 F. 2d 708 (C.A. 3, 1979); *United States* v. *Cuthbertson*, 630 F. 2d 139 (C.A. 3, 1980); Cf. *United States* v. *Criden*, 633 F. 2d 346 (C.A. 3, 1980).

At least 26 States have enacted some form of journalists' shield law. E.g., Calif. Evid. Code § 1070; N.J. Rev. Stat. §§ 2A:84A–21, 21a, -29. The reported cases evince judicial hesitancy to give effect to these statutes. See, e.g., *Farr* v. *Pitchess*, 522 F. 2d 464 (C.A. 9, 1975), *cert. den.*, 427 U.S. 912 (1976); *Rosato* v. *Superior Court*, 51 Cal. App. 3d 190, 124 Cal. Rptr. 427 (1975), *cert. den.*, 427 U.S. 912 (1976). The greatest difficulty these laws experience, however, is the possibility of a constitutional conflict with the Fifth and Sixth Amendment rights of criminal defendants. See *Matter of Farber*, 78 N.J. 259, 394 A. 2d 330, *cert. den. sub. nom.*, *New York Times* v. *New Jersey*, 439 U.S. 997 (1978). See also *New York Times* v. *Jascalevich*, 439 U.S. 1301, 1304, 1331 (1978) (applications to Circuit Justices for stay), and id., 886 (vacating stay).

### [P. 995, in text following N. 23, add:]

Nor does the status of an entity as a newspaper (or any other form of news medium) protect it from issuance and execution on probable cause of a search warrant for evidence or other material properly sought in a criminal investigations.[23.5] The press had argued that to permit searches of newsrooms would threaten the ability to gather, analyze, and disseminate news, because searches would be disruptive, confidential sources would be deterred from coming forward with information because of fear of exposure, reporters would decline to put in writing their information, and internal editorial deliberations would be exposed. The Court thought that First Amendment interests were involved, although it seemed to doubt that the consequences alleged would occur, but it observed that the built-in protections of the warrant clause would adequately protect those interests and noted that magistrates could guard against abuses when warrants were sought to search newsrooms through particularizations of the

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[23.5] *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 563–567 (1978). Justice Powell thought it appropriate that "a magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment" when he assesses the reasonableness of a warrant in light of all the circumstances. Id., 568 (concurring). Justices Stewart and Marshall would have imposed special restrictions upon searches when the press was the object. Id., 570 (dissenting), and Justice Stevens dissented on Fourth Amendment grounds. Id., 577.

type, scope, and intrusiveness that would be permitted in the searches.[13.5]

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[13.5] Congress has enacted the Privacy Protection Act of 1980, P. L. 96-440, 94 Stat. 1879, 42 U. S. C. § 2000aa, to protect the press and other persons having material intended for publication from federal or state searches in specified circumstances and creating damage remedies for violations.

**[P. 995, in text following N. 23 add:]**

**Government and the Conduct of Trials.**—When the Court held that the Sixth Amendment right to a public trial did not guarantee access of the public and the press to pre-trial suppression hearings, a major debate flowered that implicated all the various strands of the extent to which, if at all, the speech and press clauses protected the public and the press in seeking to attend trials.[1.5] The right of access was held protected in *Richmond Newspapers* v. *Virginia*,[2.5] but the Justices could not agree upon a majority rationale that would permit principled application of the holding to other areas in which access is sought.

Chief Justice Burger pronounced the judgment of the Court, but his opinion was joined by only two other Justices (and one of them in a separate concurrence drew conclusions probably going beyond the Chief Justice's opinion).[3.5] Basic to the Chief Justice's view was an historical treatment which demonstrated that trials were traditionally open. This openness, moreover, was no "quirk of history" but "an indispensable attribute of an Anglo-American trial." This characteristic flowed not merely from the public interest in seeing fairness and proper conduct in the administration of criminal trials, but, more important, the "therapeutic value" to the public of seeing its criminal laws in operation, purging the society of the outrage felt with the commission of many crimes, convincingly demonstrated why the tradition developed and was maintained. Thus, "a presumption of openness inheres in the very nature of a criminal trial under our system of justice." The presumption has more than custom to command it. "[I]n the context of trials . . . the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted."[4.5]

Justice Brennan, joined by Justice Marshall, followed a significantly different route to the same conclusion. In his view, "the First Amendment . . . has a *structural* role to play in securing and fostering

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[1.5] *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979).

[2.5] 448 U.S. 555 (1980). The decision was 7-to-1, Justice Rehnquist dissenting, id., 604, and Jusitce Powell not participatnig. Justice Powell, however, had taken the view in *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 397 (1979) (concurring), that the First Amendment did protect access to trials.

[3.5] See *Richmond Newspapers* v. *Virginia*, 448 U.S. 555, 582 (1980) (Justice Stevens concurring).

[4.5] Id., 564-569.

our republican system of self-government." It preserves and protects meaningful control over government through public discussion of its operation and government therefore is compelled to see to the availability of information that people need to engage in that meaningful discussion. Thus, there is in fact a right of access that arises in the context of situations implicating self-government, such as, but not limited to, trials.[5.5] To what degree the other Justices agreed with either Chief Justice Burger or Justice Brennan in their respective premises and resulting implications is sometimes difficult to discern from their opinions.[6.5]

None of the opinions attempts to delineate the factors which a trial court should consider when requested to close a trial. Certainly, a perhaps overwhelming presumption against closure may exist, but it may at times be necessary to close part or all of a particular trial, the Court having stated that no constitutional right is absolute.[7.5]

**Government as Administrator of Prisons.**—A prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.[1.5] The identifiable governmental interests at stake in its administration of prisons are the preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners.[2.5] In applying these general standards, the Court arrived at somewhat divergent points in assessing prison restrictions on mail and on face-to-face news interviews between newsmen and prisoners. Thus, in *Procunier* v. *Martinez*,[3.5] in which the Court struck down mail censorship regulations that permitted authorities to hold back or to censor mail to and from prisoners whenever they thought the letters "unduly complain[ing]," "express[ing] inflammatory . . . views or beliefs," or were "defamatory" or "otherwise inappropriate," the Court held that the rights of both the prisoner and the person outside were implicated. Whatever the basic right of the prisoner, the outsider's right to communicate with the prisoner, either by sending or by receiving mail, is grounded in the First Amendment. Therefore, the Court held, regulation of mail must further an important interest unrelated to the suppression of expression; regulation must be shown to further the substantial interest of security, order, and re-

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[5.5] Id., 585–593.

[6.5] Justice Stevens clearly took the view that the decision stood for the existence of access rights to other kinds of information in the government's control. Id., 583. Justices White and Blackmun concurred without notable analysis and Justice Stewart apparently based his concurrence on the similarity of courtrooms to other public places. Id., 581–582, 598, 601. Justice Powell, in his *Gannett* concurrence, and in his dissents in the prison access cases, *infra*, has also accepted a protected access analysis.

[7.5] See id., 603–604 (Justice Blackman concurring).

[1.5] *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974).

[2.5] *Procunier* v. *Martinez*, 416 U.S. 396, 412 (1974).

[3.5] 416 U.S. 396 (1974).

habilitation, and it must not be utilized simply to censor opinions or other expressions. Further, a restriction must be no greater than is necesary or essential to the protection of the particular government interest involved.

However, in subsequent cases, the Court found that neither prisoners nor newsmen had any affirmative First Amendment right to face-to-face interviews, when general public access to prisons was restricted and when there existed alternatives by which the news media could obtain information respecting prison policies and conditions.[4.5] Prison restrictions on such interviews do indeed implicate the First Amendment rights of prisoners, the Court held, but the justification for the restraint lay in the implementation of security arrangements, affected by the entry of persons into prisons, and the carrying out of rehabilitation objectives, affected by the phenomenon of the "big wheel," the exploitation of access to the news media by certain prisoners; alternatives to face-to-face interviews existed, such as mail and visitation with family, attorneys, clergy, and friends. The existence of alternatives and the presence of justifications for the restraint served to weigh the balance against the asserted First Amendment right, the Court held.[5.5]

While agreeing with a previous affirmation that "newsgathering is not without some First Amendment protection,"[6.5] the Court denied that the First Amendment accorded newsmen any affirmative obligation on the part of government. "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally."[7.5] Government's obligation is not to impair the freedom of journalists to seek out newsworthy information and not to restrain the publication of news. But it cannot be argued, the Court continued, "that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally."[8.5]

*Pell* and *Saxbe* did not delineate whether the "equal access" rule applied only in cases in which there was public access, so that a differ-

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[4.5] *Pell* v. *Procunier*, 417 U.S. 817 (1974). Justices Douglas, Brennan, and Marshall dissented. Id., 836.

[5.5] Id., 829–835.

[6.5] *Branzburg* v. *Hayes*, 408 U.S. 665, 707 (1972). quoted in *Pell* v. *Procunier*, 417 U.S. 817, 833 (1974).

[7.5] Id., 834.

[8.5] Ibid. The holding was applied to federal prisons in *Saxbe* v. *Washington Post*, 417 U.S. 843 (1974). Dissenting, Justices Powell, Brennan, and Marshall argued that an important societal function of the First Amendment is to preserve free public discussion of governmental affairs, that the press' role was to make this discussion informed through providing the requisite information, and that the ban on face-to-face interviews unconstitutionally fettered this role of the press. Id. 850.

ent rule for the press might follow when general access was denied, nor did they purport to begin defining what the rules of equal access are. No greater specificity emerged from *Houchins* v. *KQED*[9.5] in which the broadcaster had sued for access to a prison from which public and press alike were barred and as to which there was considerable controversy with respect to conditions. Following initiation of the suit, the administrator of the prison instituted a policy of limited public tours, for which press representatives could sign up, not including the maximum security area over which much of the controversy existed and not permitting cameras or recording devices. Overturning the injunction obtained in the lower courts, the Supreme Court reiterated that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control. . . . [U]ntil the political branches decree otherwise, as they are free to do, the media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally."[10.5] Justice Stewart, whose vote was necessary to the disposition of the case, agreed with the equal access holding but would have approved an injunction more narrowly drawn to protect the press right to use cameras and recorders so as to enlarge public access to the information.[11.5] Thus, any question of special press access appears settled by the decision; yet there still remain the questions raised above. May everyone be barred from access and, once access is accorded, does the Constitution necessitate any limitation on the discretion of prison administrators?[12.5]

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[9.5] 438 U.S. 1 (1978). Part of the decision's imprecision of meaning is attributable to the fact that two Justices did not participate, the opinion of the Court represents the views of three Justices, three Justices dissented, and one Justice concurred in views that departed somewhat from the opinion of the Court.

[10.5] Id., 15–16.

[11.5] Id., 16. "Whereas the Chief Justice appears to view 'equal access' as meaning access that is identical in all respects, I believe that the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public."

[12.5] The dissenters, Justices Stevens, Brennan, and Powell, believe that the Constitution protects the public's right to be informed about conditions within the prison and that total denial of access, such as existed prior to institution of the suit, was unconstitutional. They would have sustained the more narrowly drawn injunctive relief to the press on the basis that no member of the public had yet sought access. Id., 19. It is clear that Justice Stewart does not believe the Constitution affords any relief. "The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally." Id., 16. While the opinion of the Court, Chief Justice Burger and Justices White and Rehnquist, may be read as not deciding whether any public right of access exists, overall it appears to proceed on the unspoken basis that there is none. The second question, when Justice Stewart's concurring opinion and the dissenting opinion are combined, appears to be answerable qualifiedly in the direction of constitutional constraints upon the nature of access limitation once access is granted.

While recognizing that the First Amendment speech and associational rights of prisoners were implicated and restricted by prison regulations barring the solicitation of prisoners by other prisoners to join a prisoners' union and barring union meetings and bulk mailings concerning the union from outside sources, the Court found the regulations valid in light of the reasonable fears of correctional officials that organizational activities of the sort advocated by the union could impair discipline and lead to possible disorders.[13.5]

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[13.5] *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977).

### Governmental Regulation of Communications Industries

**[P. 997, at end of paragraph with N. 13, add:]**

"Commercial speech," the Court has now held, is protected "from unwarranted governmental regulation," although its nature makes such communication subject to greater limitations than would be expression not solely related to the economic interests of the speaker and its audience.[1.5] Overturning of this exception in free expression doctrine was accomplished within a brief span of time in which the Justices haltingly but then decisively moved to a new position. Reasserting the doctrine at first in a narrow five-to-four decision, the Court sustained the application of a city ordinance banning employment discrimination on the basis of sex to bar sex-designated employment advertising in a newspaper.[2.5] Granting that speech does not lose its constitutional protection simply because it appears in a commercial context, Justice Powell, for the Court, found the placing of want-ads in newspapers to be "classic examples of commercial speech", devoid of expressions of opinions with respect to issues of social policy; the ad "did no more than propose a commercial transaction". But the Justice also noted that employment discrimination, which was facilitated by the advertisements, was itself illegal.[3.5]

Next, the Court overturned a conviction under a state statute making it illegal, by sale or circulation of any publication, to encourage or prompt the obtaining of an abortion as applied to an editor of a weekly newspaper who published an advertisement announcing the availability of legal and safe abortions in another State and detailing the assistance that would be provided state residents in going to and obtaining abortions in the other State.[4.5] The Court discerned that the advertisements conveyed information of other than a purely commercial nature, that they related to services that were legal in the other

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[1.5] *Central Hudson Gas & Electric Corp. v. Public Service Comm.*, 447 U.S. 557, 561 (1980).

[2.5] *Pittsburgh Press Co. v. Comm. on Human Relations*, 413 U.S. 376 (1973).

[3.5] Id., 385, 389. The Court continues to hold that government may ban commercial speech related to illegal activity. *Central Hudson Gas & Electric Corp. v. Public Service Comm.*, 447 U.S. 557, 563–564 (1980).

[4.5] *Bigelow v. Virginia*, 421 U.S. 809 (1975).

jurisdiction, and that the State could not prevent its residents from obtaining abortions in the other State nor punish them for doing so.[5.5]

Then, all these distinctions were swept away as the Court voided a statute declaring it unprofessional conduct for a licensed pharmacist ot advertise the prices of prescription drugs.[6.5] Accepting a suit brought by consumers to protect their right to receive information, the Court held that speech which does no more than propose a commercial transaction is nonetheless of such social value as to be entitled to protection. Consumers' interests in receiving factual information about prices may even be of greater value than political debate, but in any event price competition and access to information about it is in the public interest. State interests asserted in support of the ban, protection of professionalism and the quality of prescription goods, were found either badly served or not served by the statute.[7.5]

Turning from the interests of consumers to receive information to the asserted right of advertisers to communicate, the Court voided several restrictions. A municipal ordinance which barred the display of "For sale" and "Sold" signs on residential lawns, purportedly so as to prevent the development and strengthening of a "fear psychology" among white residents that the community was unstable in the sense of a high turnover of housing to nonwhites with a consequent "white flight", was voided, the Court finding the right of owners to communicate their intention to sell a commodity and the right of potential buyers to receive the message was protected; the community interest could have been achieved by less restrictive means and in any event could not be achieved by restricting the free flow of truthful information.[8.5] Similarly, deciding a question it had reserved in the *Virginia Pharmacy* case, the Court held that a State could not forbid lawyers from advertising the prices they charged for the performance of routine legal services.[9.5] None of the proffered state justifications for the ban was deemed sufficient to overcome the private and societal interest in the free exchange of this form of speech.[10.5] However, a State has been held to have a much greater countervailing interest in regulating person-to-person solicitation of clients by attorneys and therefore, especially since in-person solicitation is "a business transaction in which speech is an essential but subordinate component", the state interests need only be important rather than compelling.[11.5]

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[5.5] Id., 821–825. Justices Rehnquist and White dissented. Id., 829.

[6.5] *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Justice Rehnquist dissented. Id., 781.

[7.5] Id., 763–764 (consumer's interests), 764–765 (social interest), 776–770 (justifications for the ban).

[8.5] *Linmark Association* v. *Township of Willingboro*, 431 U.S. 85 (1977).

[9.5] *Bates* v. *State Bar of Arizona*, 422 U. S. 350 (1977). Chief Justice Burger and Justices Powell, Stewart, and Rehnquist dissented. Id., 386, 389, 404.

[10.5] Id., 368–379.

[11.5] *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978). But compare *In re Primus*, 426 U. S. 412 (1978).

Moreover, a statute prohibiting the practice of optometry under a trade name was sustained because there was " a significant possibility" that the public might be mislead through deceptive utilization of the same or similar trade names.[12.5] But a state regulatory commission prohibition of utility advertisements "intended to stimulate the purchase of utility services" was held unjustified by the asserted interests in energy consumption and avoidance of subsidization of additional energy costs by all consumers.[13.5]

While commercial speech is entitled to First Amendment protection, the Court has clearly held that it is not wholly undifferentiable from other forms of expression; it has remarked on the commonsense differences between speech that does no more than propose a commercial transaction and other varieties.[14.5] In its most recent decisions, the Court elaborated from its precedents a four-pronged test by which it will consider the validity of restraints upon commercial expression.

First, certain commercial speech it not entitled to protection; the informational function of advertising is the First Amendment concern and if it does not accurately inform the public about lawful activity, it can be suppressed.[15.5]

Second, if the speech is protected, the interest of the government in regulating and limiting it must be assessed. The State must assert a substantial interest to be achieved by restrictions on commercial speech.[16.5]

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[12.5] *Friedman* v. *Rogers*, 440 U.S. 1 (1979).

[13.5] *Central Hudson Gas & Electric Corp.* v. *Public Service Comm.*, 447 U.S. 557 (1980). See also *Consolidated Edison Co.* v. *Public Service Comm.*, 447 U.S. 530 (1980) (voiding a ban on inclusion by utility in monthly bills of inserts discussing controversial issues of public policy).

[14.5] Commercial speech is viewed by the Court as usually hardier than other speech; because advertising is the *sine qua non* of commercial profits, it is less likely to be chilled by regulation. Thus, the difference inheres in both the nature of the speech and the nature of the governmental interest. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771–772 n. 24 (1976); *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 455–456 (1978). It is, of course, important to develop distinctions between commercial speech and other speech for purposes of determining when broader regulation is permissible. The Court's definitional statements have been general, referring to commercial speech as that "proposing a commercial transaction", *Ohralik* v. *Ohio State Bar Assn.*, *supra*, or as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm.*, 447 U.S. 557, 561 (1980). It has simply viewed as noncommercial advertising of views on public policy that would inhere to the economic benefit of the speaker. *Consolidated Edison Co.* v. *Public Service Comm.*, 447 U.S. 530 (1980).

[15.5] *Central Hudson Gas & Electric Co.* v. *Public Service Comm.*, 447 U.S. 557, 563–564 (1980). Within this category fall the cases involving the possibility of deception through such devices as use of trade names, *Friedman* v. *Rogers*, 440 U.S. 1 (1979), and solicitation of business by lawyers, *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447 (1978), as well as the proposal of an unlawful transaction. *Pittsburgh Press Co.* v. *Comm. on Human Relations*, 413 U.S. 376 (1973).

[16.5] *Central Hudson Gas & Electric Co.* v. *Public Service Comm.*, 447 U.S. 557, 564, 568–569 (1980). The Court deemed the State's interests to be clear and sub-

Third, the restriction cannot be sustained if it provides only ineffective or remote support for the asserted purpose.[17.5]

Fourth, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restriction cannot survive.[18.5]

Thus, the "different degree of protection" accorded commercial speech means that government need not tolerate inaccuracies to the same extent it must in other areas and it may require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent it being deceptive.[19.5] Somewhat broader times, places, and manner regulations are to be tolerated.[20.5] The rule against prior restraints may be inapplicable [21.5] and disseminators of commercial speech are not protected by the overbreadth doctrine.[22.5] In any event, courts must now analyze with some care regulations of and limitations on commercial expression, the demise of the exception permitting easy resolution no longer.

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stantial. The pattern here is similar to much due process and equal protection litigation as well as expression and religion cases in which the Court accepts the proffered interests as legitimate and worthy.

[17.5] Id., 569. The ban here was found to directly advance one of the proffered interests. Contrast this holding with *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), and *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), where the restraints were deemed indirect or ineffectual.

[18.5] *Central Hudson Gas & Electric Co.* v. *Public Service Comm.*, 447 U.S. 557, 565, 569–571 (1980). This test is, of course, the "least restrictive means" standard. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). In *Central Hudson*, the Court found the ban more extensive than was necessary to effectuate the governmental purpose.

[19.5] *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 383–384 (1977); *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978).

[20.5] *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976); *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 384 (1977). But in *Linmark Associates* v. *Township of Willingboro*, 431 U.S. 85, 93–94 (1977), the Court refused to accept a times, places, and manner defense of an ordinance prohibiting "For Sale" signs on residential lawns. First, ample alternative channels of communication were not available, and second, the ban was seen rather as a content limitation.

[21.5] *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 771–772 n. 24 (1976); *Central Hudson & Electric Co.* v. *Public Service Comm.*, 447 U.S. 557, 571 n. 13 (1980).

[22.5] *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 379–381 (1977); *Central Hudson Gas & Electric Co.* v. *Public Service Comm.*, 447 U.S. 557, 565 n. 8 (1980).

**[P. 998, add to N. 23:]**

And see *FCC* v. *National Citizens Com. for Broadcasting*, 436 U.S. 775 (1978), in which the Court unanimously upheld against First Amendment challenges FCC regulations barring prospectively, and in some instances requiring the breaking up of existing arrangements, the common ownership of a radio or television broadcast station and a daily newspaper located in the same community. In part, decision was premised on the less-favored status of broadcasting under the First Amendment but it was also premised on the lack of constitutional protections for arrangements that impair diversity and the public interest. Id., 798–802.

**[P. 1000, add to N. 5:]**

The scarcity rationale was again asserted in *FCC v. National Citizens Com. for Broadcasting*, 436 U.S. 775, 798–802 (1978).

**[P. 1000, in text following N. 5, add:]**

Sustaining FCC discipline of a broadcaster who played on the air a record containing a series of repeated "barnyard" words, considered "indecent" but not obscene, the Court posited a new theory to explain why the broadcast industry is less entitled to full constitutional protection than are other communications entities.[1.5] "First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizens, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. . . . Second, broadcasting is uniquely accessible to children, even those too young to read. . . . The ease with which children may obtain access to broadcast material . . . amply justify special treatment of indecent broadcasting"[2.5] The purport of the Court's new theory is hard to divine; while its potential is broad, the Court emphasized "the narrowness of our holding" through the concept of context, which "requires consideraction of a host of variables."[3.5] Time of day of broadcast, the likely audience, the differences between radio, television, and perhaps closed-circuit transmissions were all relevant in the Court's view. It may be, then that the case will be limited in the future to its particular facts; yet, the pronuncation of a new theory sets in motion a tendency the application of which may not be so easily cabined.

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[1.5] *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

[2.5] Id., 748–751. This was the only portion of the constitutional discussion that obtained the support of a majority of the Court. Justice Stevens opinion was joined by Chief Justice Burger and Justices Rehnquist, Powell, and Blackmun. Jutices Powell and Blackmun, id. 755, concurred also in a separate opinion, which reiterated the points made in the text. Justices Brennan and Marshall dissented with respect to the constitutional arguments made by Justices Stevens and Powell. Id., 762. Justices Stewart and White dissented on statutory grounds, not reaching the constitutional arguments. *Id.* 777.

[3.5] *Id.*, 750. See also id., 742–743 (plurality opinion), and id., 755–756 (Justice Powell concurring) ("Court reviews only the Commisson's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the Commission's opinion.")

**[P. 1000, in text following N. 7 add:]**

In *Columbia Broadcasting System* v. *Democratic National Committee*,[4.5] the Court rejected claims of parties that the broadcast networks were constitutionally required to sell to them broadcasting time for the presentation of views on controversial issues. The ruling thus

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[4.5] 412 U.S. 94 (1973).

terminated a broad drive to obtain that result but the fragmented nature of the Court's multiple opinions precludes a satisfactory evaluation of the constitutional implications of the case. Thus, four Justices in the majority appeared to have been swayed by their conclusions on the "state action" aspect of the case [5.5] and while two of them went on to discuss the First Amendment issue were the "state action" question decided differently, it is not clear what status this portion of their opinion has.[6.5] Two Justices adopted a finding of no state action for the apparent reason that they felt the contrary conclusion would have required a different result on First Amendment grounds.[7.5] Three Justices premised their conclusions on the finding that broadcaster refusal to sell time did not violate the First Amendment, although in the instance of two of the three the conclusion is not argued but drawn from the opinion of the Court in which the argument intermeshes statutory construction with constitutional considerations.[8.5] Two Justices would have found the sale of time to be mandated by the First Amendment.[9.5]

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[5.5] On "state action," see *text*, pp. 1460–1469; in context of this case, see *infra*, *p. 8246*. The four were Chief Justice Burger and Justice Rehnquist, in the opinion of the Court, id., 114–121, as did Justice Stewart, who wrote separately, id. 132, esp. 140–141, and Justice Douglas concurred separately. Id., 148, 150.

[6.5] Id., 121–132. The dissenters, id., 170, 171 (Justices Brennan and Marshall), considered this portion of the opinion of the Court dictum, but inasmuch as it was the only portion around which a majority of the Justices could agree, may *it* not be the holding? The discussion of the constitutional issue was intertwined as well with discussion of the broadcasters' obligation under the "public interest" standard of the Communications Act.

[7.5] Id., 132, 140–141 (Justice Stewart), 148, 150 (Justice Douglas).

[8.5] Id., 147 (Justices Blackmun and Powell). Justice White separately concurred, id., 146, in that part of the opinion of the Court reaching the First Amendment issue but also wrote, more sharply defining the discussion than the opinion of the Court, that the statutory and regulatory recognition of broadcaster freedom and discretion when combined with the fairness doctrine was consistent with the First Amendment.

[9.5] Id., 170, 182, 192 (Justices Brennan and Marshall).

[P. 1000, add to text following first full paragraph on page:]

*Governmentally Compelled Right of Reply to Newspapers.*—However divided it may have been in dealing with access to the broadcast media, the Court was unanimous in holding void under the First Amendment a state law that granted a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper.[10.5] Granting that the numbers of newspapers had declined over the years, that ownership had become concentrated, that new entries were prohibitively expensive, the Court agreed with proponents of the law that the problem of newspaper responsibility was a great one. But press responsibility, while desirable, "is not mandated by the Constitution," while freedom is. The compulsion exerted by government on a

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[10.5] *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

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newspaper to print that which it would not otherwise print, "a compulsion to publish that which 'reason tells them should not be published,'" runs afoul of the free press clause.[11.5]

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[11.5] Id., 256. The Court also adverted to the imposed costs of the compelled printing of replies but this seemed secondary to the quoted conclusion.

## Government Restraint of Content of Expression

### [P. 1001, in text following N. 1, add:]

The *Text* discussion of the Court's treatment of seditious speech and seditious libel, defamation, fighting words, and obscenity was premised on the "two-tier" doctrine of speech protected by the First Amendment and certain categories of speech not entitled to First Amendment protection. This doctrine was basically derived from *Chaplinsky* v. *New Hampshire*,[1.5] in which the Court opined that "certain well-defined and narrowly limited classes of speech . . . are no essential part of any exposition of ideas, and are of such slight social value as a step to truth" that government may prevent those utterances and punish those uttering them without raising any constitutional problem. If speech fell within the *Chaplinsky* categories, it was unprotected regardless of its effect; if it did not, it was protected unless it met some test relating to harm, which was usually a clear and present danger test. This *Text* discussion under this section presented a fairly consistent and sustained march by the Court to elimination of the "two-tier" doctrine and protection of all forms of speech. Accomplishment of this goal, however, meant that the Court was faced with the necessity to determine in many different situations the extent to which government could regulate expression. How the Justices worked this out in the context of such forms of expression as obscenity and defamation is detailed in the *Text* and *infra;* but in terms of general theory, dispute among the Justices has surfaced with respect to the permissibility of regulation based on content and the interrelated issue of a hierarchy of speech value according to which some forms of expression may be more readily subject to official regulation and perhaps suppression than others.

It has been, and remains, standard doctrine that it is impermissible to posit regulation of expression upon its content. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[2.5] But in recent Terms, Justice Stevens has articulated a theory under which he would permit some governmental restraint based upon content; in his view, there is a hierarchy of speech which the judiciary may determine and the appropriate level of protection under the First Amendment depends on where the kind of speech at

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[1.5] 315 U.S. 568, 571–572 (1942).

[2.5] *Police Dept.* v. *Mosley*, 408 U.S. 92, 95 (1972). See also *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 208–212 (1975).

issue fits into that hierarchy. The place within that hierarchy of any class of speech is basically settled by reference to *Chaplinsky's* formulation of whether it is "an essential part of any exposition of ideas" and what its "social value as a step to truth" is.[3.5] Thus, offensive words dealing with sex and excretion may be regulated when the words play no role or a minimal role in the exposition of ideas.[4.5] "Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice." [5.5]

A majority of the Court, however, has not joined in approving Justice Stevens' theory and in fact it appears that a majority rejects it. [6.5] One must note, however, that the Court in recent years has emphasized numerous times the role of the First Amendment in facilitating, indeed making possible, political dialogue and the operation of democratic institutions, even using the rationale in explaining why commercial speech is entitled to some protection.[7.5] While this emphasis may be read as being premised on a theory of the worthiness of speech that propounds political points of view and necessarily subordinates the degree of worthiness of lesser forms of speech, it more likely in

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[3.5] *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 744–748 (1978) (plurality opinion). See also *Young* v. *American Mini Theatres*, 427 U.S. 50, 63–73 (1976) (plurality opinion).

[4.5] Apparently, Justice Stevens would hold protected the use of these words to convey a political message and perhaps other ideological messages. *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 745–746 (1978), but see id., 746 nn. 22–23. "Some uses of even the most offensive words are unquestionably protected." Care must be taken to observe the context of the decision, review of limitations on broadcasts of the words in midday when children might be listening.

[5.5] *Young* v. *American Mini Theatres*, 427 U.S. 50, 70 (1976) (plurality opinion).

[6.5] In *Young*, *supra*, Chief Justice Burger and Justice White and Rehnquist joined Justice Stevens' opinion. Justice Powell concurred, making the fifth vote for the result, but in his opinion specifically disagreed with Justice Stevens' argument. Id., 73. Dissenting. Justice Stewart, Brennan, Marshall, and Blackmun also forcefully disagreed. Id., 84, 88. In *Pacifica*, *supra*, only Chief Justice Burger and Justice Rehnquist joined the relevant portion of Justice Stevens' opinion. Justices Powell and Blackmun disagreed in concurrence, id., 438 U.S. 755, as did Justices Brennan and Marshall in dissent. Id., 762. Justices Stewart and White reached only statutory questions and did not discuss constitutional issues. Id., 777. More recent cases reassert the impermissibility of content-based regulation. *Consolidated Edison Co.* v. *Public Service Comm.*, 447 U.S. 530, 536–540 (1980) The opinion does recognize some utilization of content, as in determining whether some speech is protected or fully protected.

[7.5] E.g., *First National Bank* v. *Bellotti*, 435 U.S. 765, 776–777, 781–783 (1978) (political discussion "at the heart of the First Amendment's protection"). On the commercial speech rationale, see *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 364 (1977); *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 764–765 (1976).

context of a celebration of the most worthy role speech plays without suggesting that other roles and other kinds of discourse are relevant in determining the measure of protection enjoyed under the First Amendment.[8.5]

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[8.5] E.g., *First National Bank* v. *Bellotti*, 435 U.S. 765, 783 (1978); *Consolidated Edison Co.* v. *Public Service Comm.*, 447 U.S. 530, 534 n. 2 (1980).

## Defamation and Criminal Libel

### [P. 1003, add to N. 12:]

That *Beauharnais* is a considerably weakened precedent is indicated by *Collin* v. *Smith*, 447 F. Supp. 676 (N.D. Ill.), *aff'd.*, 578 F. 2d 1197 (C.A. 7), *stay den.*, 436 U.S. 953 (1978), *cert. den.*, 439 U.S. 916 (1978) (Justices Blackmun and Rehnquist dissenting: Court should review decision which is in "some tension" with *Beauharnais*).

### [P. 1004, add to N. 20:]

In *Herbert* v. *Lando*, 441 U.S. 153 (1979), the Court held that a public figure suing the press for defamation could inquire during the discovery process, and presumably at trial, into the state of mind of the media defendants in order to develop proof of "actual malice." The defendant had sought to obtain an "editorial process" privilege under which an editor's thoughts, opinions, and conclusions with respect to the material gathered by him and about his conversations with his editorial colleagues would be immune from discovery. The Court thought that Sullivan's "actual malice" standard adequately protected the First Amendment interests at stake. While no Justice would have adopted the full protection rule sought by defendants, three Justices did urge the utilization of greater restrictions upon discovery in such cases. Id., 177 (Justice Powell concurring), 180 (Justice Brennan dissenting in part), 202 (Justice Marshall dissenting).

### [P. 1006, in text following N. 3, add:]

In *Gertz* v. *Robert Welch, Inc.*[1.5] the Court set off on a new path of limiting recovery for defamation by private persons than that initially charted in *Rosenbloom* v. *Metromedia*.[2.5] Henceforth, persons who are neither public officials nor public figures may recover for the publication of defamatory falsehoods so long as state defamation law establishes a standard higher than strict liability, such as negligence; damages may not be presumed, however, but must be proved and punitive damages will be recoverable only upon the *Times* showing of "actual malice."

The Court's opinion by Justice Powell established competing constitutional considerations. On the one hand, imposition upon the press of liability for every misstatement would deter not only false speech but much truth as well when the possibility that the press might have to prove everything it prints would lead to self-censorship and the consequent deprivation of the public of its access to information. On

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[1.5] 418 U.S. 323 (1974).

[2.5] 403 U.S. 29 (1971).

the other hand, there is a legitimate state interest in compensating individuals for the harm inflicted on them by defamatory falsehoods. An individual's right to the protection of his own good name is, at bottom, but a reflection of our society's concept of the worth of the individual. Therefore, an accommodation must be reached. The *Times* rule had been a proper accommodation when public officials or public figures were concerned, inasmuch as by their own efforts they had brought themselves into the public eye, had created a need in the public to information about them, and had at the same time attained an ability to counter defamatory falsehoods published about them. Private individuals are not in the same position and need greater protection. "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[3.5] Some degree of fault must be shown then.

Generally, juries may award in tort substantial damages for presumed injury to reputation merely upon a showing of publication. But this discretion of juries has the potential to inhibit the exercise of freedom of the press and moreover permits juries to penalize unpopular opinion through the awarding of damages. Therefore, defamation plaintiffs who do not prove actual malice—that is, knowledge of falsity or reckless disregard for the truth—will be limited to compensation for actual provable injuries, such as out-of-pocket loss, impairment of reputation and standing, personal humiliation, and mental anguish and suffering. A plaintiff who proves actual malice will be entitled as well to collect punitive damages.[4.5]

Subsequent cases have revealed a trend toward narrowing the scope of the "public figure" concept. A socially prominent litigant is a particularly messy divorce controversy was held not to be such a person,[5.5] and a person convicted years before of contempt after failing to appear before a grand jury was similarly not a public figure even as to commentary with respect to his conviction.[6.5] Neither was a scientist who sought and received federal grants for research, the results of which were published in scientific journals, a public figure for purposes of allegedly defamatory comment about the value of his research.[7.5] Public figures, the Court reiterated, are those who (1) occupy positions of such persuasive power and influence that they are deemed public figures for all purposes or (2) have thrust themselves to the forefront of particular public controversies in order to influence the

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[3.5] *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

[4.5] Id., 348–350. Justice Brennan would have adhered to *Rosenbloom*, id., 361, while Justice White thought the Court went too far in constitutionalizing the law of defamation. Id., 369.

[5.5] *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976).

[6.5] *Wolston* v. *Reader's Digest Assn.*, 443 U.S. 157 (1979).

[7.5] *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979).

resolution of the issues involved and are public figures with respect to comment on those issues.[8.5]

Commentary about matters of "public interest" remains clouded in terms of the *Sullivan* principle after *Time, Inc.* v. *Firestone*,[9.5] in which a news magazine interpretation of a highly ambiguous divorce decree was, in fact, false and inaccurate, but the question of the degree of fault for such conduct greatly divided the Court.

***Invasion of Privacy.***—Governmental power to protect the privacy interests of its citizens by penalizing publication or authorizing causes of action for publication implicates directly First Amendment rights. Privacy is a concept composed of several aspects.[1.5] As a tort concept, it embraces at least four branches of protected interests, protection from unreasonable intrusion upon one's seclusion, from appropriation of one's name or likeness, from unreasonable publicity given to one's private life, and from publicity which unreasonably places one in a false light before the public.[2.5]

While the Court has variously recognized valid governmental interests in extending protection to privacy,[3.5] it has at the same time interposed substantial free expression interests in the balance. Thus, in *Time, Inc.* v. *Hill*,[4.5] the *Times* privilege was held to preclude recovery under a state privacy statute that permitted recovery for harm caused by exposure to public attention in any publication which contained factual inaccuracies, although not necessarily defamatory inaccuracies, in communications on matters of public interest. When in *Gertz* v. *Robert Welch, Inc.*,[5.5] the Court held that the *Times* privilege was not applicable in defamation cases unless the plaintiff is a public official or public figure, even though plaintiff may have been involved in a matter of public interest, there was called into question the applicability of *Hill* to all "false-light" cases or only to such cases involving public officials or public figures.[6.5] And, more important, it left unre-

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[8.5] Id., 134, quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

[9.5] Id., 461–464. Concurring and dissenting opinions adopted a position on the evidence relating to *Time's* fault at variance with the Court's opinion. *Wolston* v. *Reader's Digest Assn.*, 443 U.S. 157 (1979), appears to reject firmly a "public interest" exception.

[1.5] See, e.g., W. Prosser, *Law of Torts* (Minneapolis: 4th ed. 1971), § 117; Prosser, "Privacy," 48 Calif. L. Rev. 383 (1960); T. Emerson, *The System of Freedom of Expression* (New York: 1970), 544–561. It should be noted that we do not have here the question of the protection of one's privacy from governmental invasion. *Infra*, p. *8130*.

[2.5] *Restatement of the Law* (*Second*), Torts (Tent. Draft No. 13, 1967), 652A–652E; and see id., (Tent. Draft No. 21, 1975), 86–91.

[3.5] *Time, Inc.* v. *Hill*, 385 U.S. 374, 383 n. 7 (1967); and id., 402, 404 (Justice Harlan, concurring in part and dissenting in part), 411, 412–415 (Justice Fortas dissenting); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 487–489 (1975).

[4.5] 385 U.S. 374 (1967). See also *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245 (1974).

[5.5] 418 U.S. 323 (1974).

[6.5] Cf. *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 250–251 (1974); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 490 n. 19 (1975).

solved the issue "whether the State may ever define and protect an area of privacy free from unwanted publicity in the press".[7.5]

In *Cox Broadcasting*, the Court declined to pass on the broad question, holding instead that the accurate publication of information obtained from public records is absolutely privileged. Thus, the State could not permit a civil recovery for invasion of privacy occasioned by the reporting of the name of a rape victim obtained from court records and from a proceeding in open court.[8.5] Nevertheless, the Court in appearing to retreat from what had seemed to be settled principle, that truth is a constitutionally required defense in any defamation action, whether plaintiff be a public official, public figure, or private individual, may have preserved for itself the discretion to recognize a constitutionally permissible tort of invasion of privacy through publication of truthful information.[9.5] But in recognition of the conflicting interest—in expression and in privacy—it is evident that the judicial process in this area will be cautious.

***"Right of Publicity" Tort Actions.***—In *Zacchini* v. *Scripps-Howard Broadcasting Co.*,[1.5] the Court held unprotected by the First

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[7.5] *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

[8.5] More specifically, the information was obtained "from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection." Id., 491. There was thus involved both the First Amendment and the traditional privilege of the press to report the events of judicial proceedings. Id., 493, 494–496.

[9.5] Thus, Justice White for the Court notes that the defense of truth is constitutionally required in suits by public officials or public figures. But "[t]he Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamatory action brought by a private person as distinguished from a public official or public figure." Id., 490. If truth is not a constitutionally required defense, then it would be possible for the States to make truthful defamations of private individuals actionable and, more important, truthful reporting of matters that constitute invasions of privacy actionable. See *Brasco* v. *Reader's Digest*, 4 Cal. 3d 520, 483, P. 2d 34, 93 Cal. Rptr. 866 (1971); *Commonwealth* v. *Wiseman*, 356 Mass. 251, 249 N.E. 2d 610 (1969), *cert. den.*, 398 U.S. 960 (1970). Concurring in *Cohn*, 420 U.S., 497, Justice Powell contended that the question of truth as constitutionally required defense was long settled in the affirmative and that *Gertz* itself, which he wrote, was explainable on no other basis. But he too would reserve the question of actionable invasions of privacy through truthful reporting. "In some instances state actions that are denominated actions in defamation may in fact seek to protect citizens from injuries that are quite different from the wrongful damage to reputation flowing from false statements of fact. In such cases, the Constitution may permit a different balance. And, as today's opinion properly recognizes, causes of action grounded in a State's desire to protect privacy generally implicate interests that are distinct from those protected by defamation actions." Id., 500.

[1.5] 433 U.S. 562 (1977). The "right of publicity" tort is conceptually related to one of the privacy strands, "appropriation" of one's name or likeness for commercial purposes. Id., 569–572. Justices Powell, Brennan, and Marshall dissented finding the broadcast protected, id., 579, and Justice Stevens dissented on other grounds. Id., 582.

Amendment a broadcast of a video tape of the "entire act" of a "human cannonball" in the context of his suit for damages against the company for having "appropriated" his act, of having injured his right to the publicity value of his performance. The Court emphasized two differences between the legal action permitted here and the legal actions found unprotected or not fully protected in defamation and other privacy-type suits. First, the interest sought to be protected was, rather than a party's right to his reputation and freedom from mental distress, the right of the performer to remuneration for putting on his act. Second, the other torts if permitted decreased the information which would be made available to the public whereas permitting this tort action would have an impact only on "who gets to do the publishing."[3.3] In both respects, the tort action was analogous to patent and copyright laws in that both provide an economic incentive to persons to make the investment required to produce a performance of interest to the public.[3.4]

***Publication of Legally Confidential Information.***—While a State may have numerous and important valid interests in assuring the confidentiality of certain information, it may not maintain this confidentiality through the criminal prosecution of nonparticipant third parties, including the press, who disclose or publish the information.[1.5] The case arose in the context of the investigation of a state judge by an official disciplinary body; both by state constitutional provision and by statute, the body's proceedings were required to be confidential and the statute made the divulging of information about the proceeding a misdemeanor. For publishing an accurate report about an investigation of a sitting judge, the newspaper was indicted and convicted of violating the statute which the state courts construed to apply to nonparticipant divulging. Although the Court recognized the importance of confidentiality to the effectiveness of such a proceeding, it held that the publication here "lies near the core of the First Amendment" because the free discussion of public affairs, including the operation of the judicial system, is primary and the State's interests were simply insufficient to justify the encroachment on freedom of speech and of the press.[2.5] The scope of the privilege thus conferred by this decision on the press and on individuals is, however,

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[3.3] Id., 573–574. Plaintiff was not seeking to bar the broadcast but rather to be paid for the value he lost through the broadcasting.

[3.4] Id., 576–578. This discussion is the closest the Court has come in considering how copyright laws in particular are to be reconciled with the First Amendment. The Court's emphasis is that they encourage the production of work for the public's benefit.

[1.5] *Landmark Communications v. Virginia*, 435 U.S. 829 (1978). The decision by Chief Justice Burger was unanimous, Justices Brennan and Powell not participating, but Justice Stewart would have limited the holding to freedom of the press to publish. Id., 848. See also *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979).

[2.5] Id., 838–842. The state court's utilization of the clear-and-present-danger test was disapproved in its application; additionally, the Court questioned the relevance of the test in this case. Id., 842–845.

somewhat unclear, because the Court appeared to reserve consideration of broader questions than those presented by the facts of the case[3.5] but it does appear that government would find it difficult to punish the publication of almost any information by a nonparticipant to the process in which the information was developed to the same degree as it would be foreclosed from obtaining prior restraint of such publication.[4.5]

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[3.5] *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), in the context of a civil proceeding, had held that the First Amendment did not permit the imposition of liability on the press for truthful publication of information released to the public in official court records, id., 496, but had expressly reserved the question "whether the publication of truthful information withheld by law from the public domain is similarly privileged", id., 497 n. 27, and *Landmark* on its face appears to answer the question affirmatively. Caution is impelled, however, by the Court's similar reservation. "We need not address all the implications of that question here, but only whether in the circumstances of this case Landmark's publication is protected by the First Amendment." Id., 435 U.S., 840.

[4.5] See *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539 (1976).

## Fighting Words

### [P. 1009, in text following N. 17, add:]

The Court has reiterated that a State may not punish the utterance of profane, vulgar, or opprobrious words simply because they are offensive; it may only punish the utterance of "fighting words" and that under a statute or ordinance narrowly drawn or construed to reach "those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[1.5]

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[1.5] *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974). The division of the Court is noted in the *Text*, p. 1009, n. 17, and continues. See also *Cason* v. *City of Columbia*, 409 U.S. 1053 (1972); *Plummer* v. *City of Columbus*, 414 U.S. 2 (1973); *Hess* v. *Indiana*, 414 U.S. 105 (1973); *Karlan* v. *City of Cincinnati*, 416 U.S. 924 (1974); *Lucas* v. *Arkansas*, 416 U.S. 919 (1974); *Kelly* v. *Ohio*, 416 U.S. 923 (1974); *Rosen* v. *California*, 416 U.S. 924 (1974); and see *Eaton* v. *City of Tulsa*, 415 U.S. 697 (1974). *Papish* v. *Board of Curators*, 410 U.S. 667 (1973), held that a state university could not expel a student for using "indecent speech" in a campus newspaper. Justice Stevens' position is unclear, although he appears to subscribe to the view that the defree to which "indecent" and other offensive speech is protected is highly dependent upon context. *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 744–748 (1978) (plurality opinion). See also *Young* v. *American Mini Theatres*, 427 U.S. 50, 70 (1976) (plurality opinion) (in context of erotic, nonpornographic speech).

## Obscenity

### [P. 1012, add to N. 3:]

Note that those Justices taking the position that the First Amendment proscribes governmental censorship of sexually explicit materials would recognize a governmental interest in barring access to pornography by children. *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49, 73, 113 (1973) (Justice Brennan dissenting).

That such governmental power is not limitless is reiterated in *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 212–214 (1975), in the context of nudity on screen not limited to materials alleged to be pornographic. "It is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youth than on those available to adults. . . . Nevertheless, minors are entitled to a significant measure of First Amendment protection, . . . and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them. . . . Clearly all nudity cannot be deemed obscene even as to minors. . . . Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." See the discussion in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). But see *Pinkus* v. *United States*, 436 U.S. 293, 296–298 (1978).

## [P. 1012, add to N. 4:]

The Court has limited, in the context of erotic motion pictures or pictorial displays of nudity, not alleged to meet constitutional standards identifying pornography, governmental power to protect unwilling recipients from intrusions by some kinds of expression. Absent intrusions into the home or a degree of captivity that makes it impractical for the unwilling viewer or auditor to avoid exposure, government may not censor content to protect the sensibilities of some. It is up to offended individuals to turn away. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 208–212 (1975). In the context of an "invasion" of the home by radio broadcasts, see *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978).

## [P. 1012, add to N. 5:]

For the Court's Fourth Amendment standards, see *Heller* v. *New York*, 413 U.S. 483 (1973); *Roaden* v. *Kentucky*, 413 U.S. 496 (1973); *Lo-Ji Sales* v. *New York*, 442 U.S. 319 (1979); and see *Walter* v. *United States*, 447 U.S. 649 (1980). It has held that the *scienter* requirement is met by proof of knowledge of the contents of materials and it is not necessary to show that a defendant believed the materials to be obscene. *Hamling* v. *United States*, 418 U.S. 87, 119–124 (1974). Another significant procedural issue concerns the utilization of civil declaratory judgment processes in which the issue of obscenity is determined; the major question is, given that the system would provide the best avenue for determining whether sexually explicit material is protected prior to a criminal trial, *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49, 55 (1973), whether persons who were not parties to the civil proceeding can be bound by determinations there made. *McKinney* v. *Alabama*, 424 U.S. 669 (1976), held that a criminal defendant could not constitutionally be precluded from relitigating the issue of obscenity previously made in a civil proceeding to which he was not a party when he was not in privity with the respondents there and there was no showing of identity of interests between defendant and those respondents. On the validity of a public nuisance statutory approach with injunctions of future exhibitions of films on the basis of the past exhibition of obscene films, see *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980).

## [P. 1013, add to N. 9:]

On the continuing relevance of pandering, see *Splawn* v. *California*, 431 U.S. 595 (1977). Justice Stevens argued that *Ginzburg* did not survive the extension of protection to commercial speech. Id., 602 (dissenting). See also *Pinkus* v. *United States*, 436 U.S. 293, 303–304 (1978).

**[P. 1014, add to N. 10:]**

See also *Ward* v. *Illinois*, 431 U.S. 767 (1977).

**[P. 1014, add to N. 12:]**

On the precedential effect of the plurality opinion in *Memoirs*, see *Marks* v. *United States*, 430 U.S. 188, 192–194 (1977).

**[P. 1017, add to N. 25:]**

Note the circumscribing of *Stanley* in *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49, 65–68 (1973).

**[P. 1018, add to text immediately preceding "Speech Plus" section head:]**

Pornography regulation and the limitations of the First Amendment upon it have been extensively and intensively considered in this period by the Court. The Court's approach has changed and it has formulated new standards, giving government, federal, state, and local, greater power than it previously possessed to outlaw the sale and dissemination of materials found to be pornographic. These governments do not have *carte blanche*, however, and it seems clear that the Court's docket is to regularly contain a staple of such cases.

At the end of the October 1971 Term, the Court requested argument on the question whether the display of sexually oriented films or of sexually oriented pictorial magazines, when surrounded by notice to the pubic of their nature and by reasonable protection against exposure to juveniles, was constitutionally protected.[6.5] By a five-to-four vote the following Term, the Court adhered to the principle established in *Roth* that obscene material is not protected by the First and Fourteenth Amendments.[7.5] Chief Justice Burger for the Court observed that the States have wider interests than protecting juveniles and unwilling adults from exposure to pornography; legitimate state interests, effectuated through the exercise of the police power, exist in protecting and improving the quality of life and the total community environment, in improving the tone of commerce in the cities, and in protecting public safety. It matters not that the States may be acting on the basis of unverifiable assumptions in arriving at the conclusion to suppress the trade in pornography; the Constitution does not require in the context of the trade in ideas that governmental courses of action be subject to empirical verification any more than it does in other fields. Neither is there some constitutionally prescribed concept of *laissez faire*, no concept of privacy, no right, no imposition of Millsean "free will" to curb governmental efforts to suppress pornography.[8.5]

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[6.5] *Paris Adult Theatre* v. *Slaton*, 408 U.S. 921 (1972); *Alexander* v. *Virginia*, 408 U.S. 921 (1972).

[7.5] *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49 (1973).

[8.5] Id., 57, 60–62, 63–64, 65–68. Delivering the principal dissent, Justice Brennan argued that the Court's *Roth* approach allowing the suppression of pornog-

In *Miller* v. *California*,[9.5] the Court then undertook to enunciate standards by which unprotected pornographic materials were to be identified. Because of the inherent dangers in undertaking to regulate any form of expression, laws to regulate pornography must be carefully limited; their scope is to be confined "to works which depict or describe sexual conduct." That conduct must be specifically defined by the applicable statute, whether as written or as authoritatively construed by the courts.[10.5] The law "must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value."[11.5] The standard that a work must be "utterly without redeeming social value" before it may be suppressed was disavowed and discarded. In determining whether material appeals to a prurient interest or is patently offensive, the trier of fact, whether a judge or a jury, is not bound by a hypothetical national standard but may apply the local community standard where the trier of the fact sits. Prurient interest and patent offensiveness, the Court indicated, "are essentially questions of fact."[12.5] The Court reiterated that it was not

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raphy was a failure, that the Court had not and could not formulate standards by which protected materials could be distinguished from unprotected materials, and that the First Amendment had been denigrated through the exposure of numerous persons to punishment for the dissemination of materials that fell close to one side of the line rather than the other but more basically by deterrence to protected expression caused by the uncertainty. Id., 73. "I would hold, therefore, that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents". Id., 113. Justices Stewart and Marshall joined this opinion; Justice Douglas dissented separately, adhering to the view that the First Amendment absolutely protected all expression. Id., 70.

[9.5] 413 U.S. 15 (1973). The same standards were held applicable to federal laws, *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123 (1973) (importation of pornography); *United States* v. *Orito*, 413 U.S. 139 (1973) (transportation of pornography in interstate commerce); *Hamling* v. *United States*, 418 U.S. 87 (1974) (use of the mails).

[10.5] *Miller* v. *California*, 413 U.S. 15, 24 (1973). The Court stands ready to import into the general phrasings of federal statutes the standards it has now formulated. *United States* v. *12 200-Ft. Reels of Film*, 413 U.S. 123, 130 n. 7 (1973) (Court is prepared to construe statutes proscribing materials that are "obscene," "lewd," "lascivious," "filthy," "indecent," and "immoral" as limited to the types of "hard core" pornography reachable under the *Miller* standards); *Hamling* v. *United States*, 418 U.S. 87, 110–116 (1974). The Courts insistence on specificity in state statutes, either as written by the legislature or as authoritatively construed by the state court, appears to have been significantly weakened, in fact if not in enunciation, in *Ward* v. *Illinois*, 431 U.S. 767 (1977).

[11.5] *Miller* v. *California*, 413 U.S. 15, 24 (1973).

[12.5] Id., 30–34. "A juror is entitled to draw on his knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law." *Hamling* v.

permitted an unlimited degree of suppression of materials. Only "hard core" materials were to be deemed without the protection of the First Amendment; its idea of the content of "hard core" pornography was revealed in its example of the types of conduct that could not be portrayed: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[13.5] Neither did the portrayal have to be limited to pictorial representation; books containing only descriptive language, no pictures, were subject to suppression under the standards.[14.5]

First Amendment values, the Court stressed in *Miller*, "are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary."[15.5] But the Court had conferred on juries as triers of fact determination whenever something was "patently offensive" as a question essentially of fact based upon their understanding of community standards. Did not this virtually immunize these questions from appellate review? In *Jenkins* v. *Georgia*,[16.5] the Court, while adhering to the *Miller* standards, stated that "juries [do not] have unbridled discretion in determining what is 'patently offensive.'" *Miller* was intended to make clear that only "hard-core" materials could be suppressed and this concept and the Court's descriptive itemization of some types of hard-core materials were "intended to fix substantive constitutional limitations, deriving from the First Amendment, on the type of material subject to such a determination." The Court's own viewing of the motion picture in question convinced it that "[n]othing in the movie falls within either of the two examples given in *Miller* of material

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*United States*, 418 U.S. 87, 104 (1974). The holding does not compel any particular circumscribed area to be used as a "community". In federal cases, it will probably be the judicial district from which the jurors are drawn, *Id.*, 105–106. Indeed, the jurors may be instructed to apply "community standards" without any definition being given of the "community." *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974). In a federal prosecution for use of the mails to transmit pornography, the fact that the legislature of the State within which the transaction takes place has abolished pornography regulation except for dealings with children does not preclude permitting the jurors in the federal case to make their own definitions of what is offensive to contemporary community standards; they may be told of the legislature's decision but they are not bound by it. *Smith* v. *United States*, 431 U.S. 291 (1977).

[13.5] *Miller* v. *California*, 413 U.S. 15, 25–28 (1973). Quoting *Miller's* language in *Hamling* v. *United States*, 418 U.S. 87, 114 (1974), the Court reiterated that it was only "hard-core" material that was unprotected. "While the particular descriptions there contained were not intended to be exhaustive, they clearly indicate that there is a limit beyond which neither legislative draftsmen nor juries may go in concluding that particular material is 'patently offensive' within the meaning of the obscenity test set forth in the *Miller* cases."

[14.5] *Kaplan* v. *California*, 413 U.S. 115 (1973).

[15.5] *Miller* v. *California*, 413 U.S. 15, 25 (1973).

[16.5] 418 U.S. 153 (1974).

which may constitutionally be found to meet the 'patently offensive' element of those standards, nor is there anything sufficiently similar to such material to justify similar treatment."[17.5] But in a companion case, the Court found that a jury determination of obscenity "was supported by the evidence and consistent with" the standards.[18.5]

Despite the narrowness by which the decisions in this area from *Slaton* and *Miller* on have been rendered, the Court appears settled on its course.[19.5] Only a change of membership in the Court's majority seems likely to alter the approach it is taking on pornography regulation and a change among the minority Justices could of course strengthen the majority's position.[20.5]

While the Court has adhered to a relatively consistent line with respect to its new obscenity standards, it has wrestled with some difficulty in determining the scope of First Amendment protection to be accorded sexually explicit materials, displays, and performances as to which no finding that the challenged works are unprotected have been made. Thus, without passing on the question whether the musical play "Hair" was protected or whether it was obscene under constitutional standards, the Court held that the refusal of municipal authorities to license it for performance in a public auditorium was invalid in the absence of those procedural safeguards that must accompany a system of prior restraint.[21.5] And it further held that a city could not

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[17.5] Id., 161.

[18.5] *Hamling v. United States*, 418 U.S. 87 (1974). In *Smith v. United States*, 431 U.S. 291, 305-306 (1977), the Court explained that jury determinations in accordance with their own understanding of the tolerance of the average person in their community does not mean the determination is unreviewable. Judicial review would pass on (1) whether the jury was properly instructed to consider the entire community and not simply the members' own subjective reaction or the reactions of a senstive or of a callous minority, (2) whether the conduct depicted fell within the examples specified in *Miller*, (3) whether the work lacked serious literary, artistic, political, or scientific value, and (4) whether the evidence was sufficient. The Court indicated that the value test of *Miller* "was particularly amenable to judicial review." Whether it meant that its failure to list them meant to exclude prurient interest and patent offensiveness from appellate review is a question of considerable importance. See Id., 311, 315-316 (Justice Stevens dissenting).

[19.5] See the decisions in *Marks v. United States*, 430 U.S. 188 (1977); *Smith v. United States*, 431 U.S. 291 (1977); *Splawn v. California*, 431 U.S. 595 (1977); *Ward v. Illinois*, 431 U.S. 767 (1977). Each was a five-to-four decision.

[20.5] The three *Slaton-Miller* dissenters on the Court continue to insist on their constitutional interpretation. See, e.g., *Ward v. Illinois*, 431 U.S. 767, 777 (1977) (dissenting); *Smith v. United States*, 431 U.S. 291, 310 (1977) (dissenting). Justice Stevens, replacing Justice Douglas, has taken the position that criminal enforcement of obscenity law should be constitutionally proscribed, that First Amendment interests cannot adequately be protected through such a process, but that pornography should be regulated under civil abatement of nuisance forms of procedure. Id., 311.

[21.5] *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975). Justice Blackmun's opinion for the Court was dissented from by Justices White and Rehnquist and Chief Justice Burger. Id., 564, 570. See also *Doran v. Salem Inn*, 422 U.S.

constitutionally make it a public nuisance for a drive-in motion picture theatre to show films containing nudity if the screen were visible from a public street or place.[22.5] But a municipal zoning ordinance, providing that "adult theatres" showing motion pictures that depicted "specified sexual activities" or "specified anatomical areas" could not be located within 100 feet of any two other establishments included within the ordinance or within 500 feet of a residential area, was sustained as a valid utilization of the locality's zoning power to prevent deterioration of urban areas.[22.6]

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922 (1975). ("Although the customary 'bar room' type of nude dancing may involve only the barest minimum of protected expression, . . . this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." Id., 932. Unlike the ordinance sustained in *California v. LaRue*, 409 U.S. 109 (1972), which barred nude dancing in establishments serving liquor and was sustained on the alcohol regulation basis, the ordinance in *Doran* was not so limited and might trench on protected activities. Because the question was before the Court on the granting of a preliminary injunction, the ultimate merits were not reached).

[22.5] *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). Justice Powell's opinion for the Court was dissented from by Chief Justice Burger and Justices White and Rehnquist. Id., 218, 224. The ordinance was deemed invalid as a classification on the basis of the content of the motion picture and as not justified by governmental interests relating to children or unwilling adults or to traffic control.

[22.6] *Young v. American Mini Theatres* 427, U.S. 50 (1976). A plurality, Justices Stevens, White, and Rehnquist and Chief Justice Burger, would sustain the ordinance as a permissible classification on the basis of the content of motion pictures. Id., 62-71. Justice Powell, concurring, rejected this approach but voted to sustain the ordinance as a measure that served valid governmental interests and which only incidentally affected expression and that minimally since it did not really deprive a willing audience of exposure of the motion pictures desired. Id., 73. Justices Stewart, Brennan, Marshall, and Blackmun dissented. Id., 84, 88. See also *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (raising the same issues and occasioning the same division in the context of a radio broadcast of "indecent" speech).

## Speech Plus

**[P. 1020, in text following N. 13, add:]**

"The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false."[13.5] So saying, the Court held that military interests in keeping official military activities on a base wholly free of entanglement with partisan political campaigns of any kind justified a flat ban on speeches and demonstrations of a partisan political nature and also justified the prohibition of distribution of literature without prior approval of post headquarters under adequate procedural guarantees.

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[13.5] *Greer v. Spock*, 424 U.S. 828, 838 (1976). See also *Brown v. Glines*, 444 U.S. 348, 353-358 (1980).

BEST DOCUMENT AVAILABLE

### [P. 1020, add to N. 15:]

This rationale of equal protection provided the basis for voiding a statute prohibiting picketing of residences or dwellings with the exception of peaceful picketing of a place of employment involved in a labor dispute. *Carey* v. *Brown*, 447 U.S. 455 (1980). See also *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975). Four Justices supported a more limited application of the principle in *Young* v. *American Mini Theatres*, 427 U.S. 50, 63–73 (1976).

### [P. 1020, in text following N. 15 add:]

However, the refusal of a city transit system to sell advertising space on its buses for political commercials while allowing other types of advertising was sustained, although no majority of the Court agreed on the reason it was permissible.[1.5]

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[1.5] *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974). Four Justices concluded that the policy of the system was simply part of a commercial venture and the distinction between kinds of advertising was a rational one to avoid the disruption of the operation of the facility that might result from access. Justice Douglas concurred because of the "captive audience" problem, id., 305, and four Justices dissented on the basis that the buses constituted public fora and the system could not discriminate between messages. Id., 308. See *Consolidated Edison Co.* v. *Public Service Comm.*, 447 U.S. 530, 538–539 (1980) (*Lehman* a "narrow exception" to rule against subject-matter distinctions).

### [P. 1023, in text following N. 24, add:]

*Logan Valley Plaza* has now been overruled and the Court has held that shopping centers are not functionally equivalent to the company town involved in *Marsh*.[2.5] The ruling came in a case in which a union of employees engaged in an economic strike against one store in a shopping center was barred from picketing the store within the mall. The rights of employees in such a situation is generally to be governed by federal labor laws,[3.5] although state constitutional provisions may be interpreted more expansively to protect some kinds of public issue picketing in shopping centers and similar places.[4.5]

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[2.5] *Hudgens* v. *NLRB*, 424 U.S. 507 (1976). Justice Stewart's opinion for the Court asserted that *Logan Valley* had in fact been overruled by *Lloyd Corp.*, id., 517–518, but the author of the *Lloyd Corp.* opinion did not believe that to be the case, id., 523, and neither did Justice White. Id., 524. Justices Marshall and Brennan dissented. Id., 525. In any event, *Logan Valley Plaza* is now overruled. Henceforth, only when private property has taken on *all* the attributes of a municipality is it to be treated as public. Id., 516–517, quoting Justice Black's dissent in *Logan Valley Plaza*, 391 U.S., 332–333.

[3.5] But see *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180 (1978).

[4.5] In *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), the Court held that a state court interpretation of the state constitution to protect picketing in a privately owned shopping center did not deny the property owner any federal constitutional rights.

### [P. 1024, add to N. 8:]

In *NLRB* v. *Retail Store Employees*, 447 U.S. 607 (1980), the Court held that a ban on labor union picketing of companies doing business with the primary employer with signs requesting customers of the companies to cease doing business with them did not violate the union's First Amendment rights. A plurality thought the result followed because the union objective was unlawful. Id., 616. Two concurring Justices found the question more difficult because the ban related to the content of the communication. Id., 616, 618. See also *American Radio Assn.* v. *Mobile Steamship Assn.*, 419 U.S. 215, 228–232 (1974).

**[P. 1026, add to N. 24:]**

The residential picketing issue was also passed up in the Court's resolution of *Carey* v. *Brown*, 447 U.S. 455 (1980).

**[P. 1029, in text following N. 12, add:]**

"[T]he Court has consistently recognized a municipality's power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing. A narrowly drawn ordinance, that does not vest in municipal officials the undefined power to determine what messages residents will hear, may serve these important interests without running afoul of the First Amendment."[1.5] While striking down the ordinance in question for vagueness, the Court rationalized its previous decisions to find support for measures that would require some form of notice to officials and the obtaining of identification in order that persons could canvass house to house for charitable or political purposes.

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[1.5] *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 616–617 (1976). Justices Brennan and Marshall dissented from the part of the opinion approving the regulatory power. Id., 623. See also *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980) (voiding as overbroad an ordinance prohibiting door-to-door solicitations by charitable organizations that do not use at least 75 percent of their receipts for defined charitable purposes).

**[P. 1030, add to N. 23:]**

On hair, see *Kelley* v. *Johnson*, 425 U.S. 238 (1976). Nude dancing is entitled to some minimal protection. *Doran* v. *Salem Inn*, 422 U.S. 922, 932 (1975).

**[P. 1030, in text following N. 23; add:]**

Two flag desecration cases were decided by the Court in a manner that indicated a beginning of an effort to resolve the standards of First Amendment protection of "symbolic conduct." In *Smith* v. *Goguen*,[2.5] the conviction of one for wearing a small United States flag sewn to the seat of his trousers under a statute punishing anyone who "publicly . . . treats contemptuously the flag of the United States . . ." was set aside because that portion of the statute was void for vagueness. "The language at issue is void for vagueness as applied to Goguen because it subjected him to criminal liability under a standard so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag."[2.6]

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[2.5] 415 U.S. 566 (1974).

[2.6] Id., 578. The holding was thus founded on due process rather than the First Amendment.

Justice White thought the statute not vague but concurred on First Amendment grounds; in his view, government could properly legislate against acts expressive of ideas or opinions involving the flag when the object was to protect the physical integrity of the flag or to protect against acts interfering with the proper use of the flag.[4.5] The First Amendment was the basis for reversal in *Spence* v. *Washington*,[5.5] in which a conviction under a statute punishing the display of a United States flag to which something is attached or superimposed was set aside; Spence had hung his flag from his apartment window upside down with a peace symbol taped to the front and back. The act, the Court thought, was a form of communication, and because of the nature of the act, the factual context and environment in which it was undertaken, the Court held it to be protected. The factual context included the fact that the flag was privately owned, that it was displayed on private property, and that there was no danger of breach of the peace. The nature of the act was that it was intended to express an idea and it did so without damaging the flag. The Court assumed that the State had a valid interest in preserving the flag as a national symbol but whether this interest extends beyond protecting the physical integrity of the flag is unclear.[6.5] In sum, the Court's opinion is so based upon the particularities of Spence's conduct that the guidance afforded for other cases is highly speculative.[7.5]

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[4.5] Id., 583. Dissenting, Justices Rehnquist and Blackmun and Chief Justice Burger thought government could protect the integrity of the flag, as from burning or tearing it, and could protect its status as a symbol from acts which abused the symbol, although not from verbal contempt. Id., 591, 592.

[5.5] 418 U.S. 405 (1974).

[6.5] Id., 408–411, 412–413. Justice Blackmun concurred in the result and Justices Rehnquist and White and Chief Justice Burger dissented. Id., 416. They would permit government to prevent the use of the flag as "a background for communication" as a way of preserving the character of the flag.

[7.5] Subsequently, the Court vacated, over the dissents of Chief Justice Burger and Justices White, Blackmun, and Rehnquist, two convictions for burning flags and sent them back for reconsideration in the light of *Goguen* and *Spence*. *Sutherland* v. *Illinois*, 418 U.S. 907 (1974); *Farrell* v. *Iowa*, 413 U.S. 907 (1974). The Court did, however, dismiss, "for want of a substantial federal question," an appeal from a conviction under a flag desecration statute of one who, with no apparent intent to communicate but in the course of "horseplay", blew his nose on a flag, simulated masturbation on it, and finally burned it. *Van Slyke* v. *Texas*, 418 U.S. 907 (1974).

## AMENDMENT II—BEARING ARMS

**[P. 1036, add to N. 7:]**

For dictum indicating a limited view of what the Second Amendment guarantees, see *Lewis* v. *United States*, 445 U.S. 55, 65 n. 8 (1980).

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## AMENDMENT 4—SEARCHES AND SEIZURES

### Scope

### [P. 1045, add to N. 19:]

Apparently, the Court remains closely divided on the degree to which the "reasonableness" of a search is bounded by the warrant clause, although in more recent cases the principle that warrantless searches are *per se* unreasonable, with a few carefully prescribed exceptions, has been stated as the governing rule without recurrence of the earlier controversy. E.g., *Arkansas* v. *Sanders*, 442 U.S. 753, 758 (1979); *Mincey* v. *Arizona*, 437 U.S. 385, 390 (1978); *Michigan* v. *Tyler*, 436 U.S. 499, 506 (1978); *Marshall* v. *Barlow's Inc.*, 436 U.S. 307, 312 (1978). But in *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), Justices Stewart, Douglas, Brennan, and Marshall had adhered to the view that except in narrowly circumscribed circumstances a warrant is necessary, while Justices White, Blackmun, and Rehnquist, and Chief Justice Burger would have placed greater emphasis upon questions of reasonableness without necessary regard to the warrant requirement. Id., 285. Justice Powell generally appeared to agree with the former group of Justices, id., 275, and see *South Dakota* v. *Opperman*, 428 U.S. 364, 383 (1976), but he joined opinions taking the other view, although in each instance the result was supportable upon other considerations. *Cady* v. *Dombrowski*, 413 U.S. 433 (1973); *United States* v. *Edwards*, 415 U.S. 800 (1974). Justice Stevens, replacing Justice Douglas, appears to subscribe to the same view on this point that Justice Douglas held, in cases involving the investigation of criminal activity, *Marshall* v. *Barlow's, Inc.*, *supra*, 326, but he joined the Chief Justice's opinion in *Opperman*, *supra*, which was premised on the "reasonableness" standard. The result was not dictated by this premise, as shown by Justice Powell's concurrence, and perhaps as well by Justice White's dissent. Id., 396.

Justice Stevens, however, has argued for giving independent content to "reasonableness" in at least two respects. First, even in criminal investigations where warrants are used, he would in some circumstances utilize the reasonableness clause to restrict the scope or even the fact of a search under warrant. *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 577 (1978) (search of nonsuspect for mere evidence); *Marshall* v. *Barlow's, Inc.*, *supra*, 325 (in administrative searches reasonableness should be standard rather than watered down warrant clause).

In *Almeida-Sanchez*, *supra*, 275, Justice Powell advocated authorization of warrants issued by neutral magistrates empowering police and immigration officials to conduct roving searches of automobiles in areas near the Nation's borders upon a concept of probable cause that did not relate to knowledge about a specific automobile but based rather on the incidence of use of the area's roads for smuggling aliens, proximity to the border, and the probable degree of interference with the rights of innocent persons. The idea is that the procedure would permit effectuation of legitimate governmental goals while the warrants and judicial control over them would protect Fourth Amendment interests. A majority of the Court apparently concurs. Id., 270 n. 3, 288.

### [P. 1047, add to N. 4:]

The "expectation of privacy" test has indeed occasioned different analyses and different results in several areas. Adapting Justice Harlan's *Katz* concurrence promulgating a two-pronged test, whether there is an actual subjective expectation of privacy and whether that expectation is legitimate, the Court said, while distinctions developed in property and tort law should not define the scope of legitimate expectations of privacy, such expectations "must have a source outside the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas* v. *Illinois*, 439 U.S. 128, 143–144 n. 12 (1978). See also *United States* v. *Salvucci*, 448 U.S. 83, 91–92 (1980); *Rawlings* v. *Kentucky*, 448 U.S. 98, 105 (1980).

*United States* v. *Chadwick*, 433 U.S. 1 (1977), unanimously rejected the Government's argument that the Fourth Amendment's warrant clause protects only interests associated with the home and that outside the home the reasonableness of a search and seizure should turn only on whether there is probable cause. With respect to expectations of privacy in commercial property, see *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978); *Michigan* v. *Tyler*, 436 U.S. 499 (1978); *G. M. Leasing Corp.* v. *United States*, 429 U.S. 338 (1977). No justifiable expectation of privacy can exist with respect to bank records. *United States* v. *Miller*, 425 U.S. 435 (1976). That the Court views the justifiable expectation of privacy in automobiles as considerably less than that in a home is clear, but the degree of difference is unclear. See *United States* v. *Chadwick*, *supra*, 12–13; *Arkansas* v. *Sanders*, 442 U.S. 753, 757, 760–765 (1979), and id., 766 (Chief Justice Burger concurring), 768 (Justice Blackmun dissenting); *Delaware* v. *Prouse*, 440 U.S. 648, 662–663 (1979).

**[P. 1047, add to N. 7:]**

The law of standing has indeed been revolutionized. See *infra*, pp. S136–S158.

**[P. 1047, add to N. 11:]**

*United States* v. *Watson*, 423 U.S. 411 (1976), reaffirms that warrantless arrests based on probable cause satisfy the Fourth Amendment and that the feasibility of obtaining a warrant is an irrelevant consideration. But when police officers seek to effectuate an arrest in one's residence, they are required, absent consent to enter, to have an arrest warrant. The invasion of the sanctity of the home requires a greater authority than that needed to make an arrest in a public place. *Payton* v. *New York*, 445 U.S. 573 (1980). Chief Justice Burger and Justices White and Rehnquist dissented. Id., 603, 620. Reserved was the question whether police need a search warrant to enter a third party's residence to arrest a suspect under warrant. Id., 583. See also *United States* v. *Santana*, 427 U.S. 38 (1976) (sustaining the warrantless arrest of a suspect in her home when she was initially approached in her doorway and then retreated into the house).

**[P. 1048, add to N. 12:]**

In *United States* v. *Crews*, 445 U.S. 463 (1980), the Court, unanimously but for a variety of reasons, held proper the identification in court of a defendant, who had been wrongly arrested without probable cause, by the crime victim. The identification in court was not tainted by either the arrest or the subsequent in-custody identification but proceeded from the victim's recollection of defendant's appearance at the time of the crime, demonstrated by the description she gave police on the scene. Concurring Justices sought a broader ruling to the effect that *Ker* and *Frisbie* v. *Collins*, 342 U.S. 519 (1952), in holding that an illegal arrest did not preclude bringing defendant to trial at which point he could be identified, conclusively settled the matter.

**[P. 1048, add to N. 13:]**

In *Brown* v. *Illinois*, 422 U.S. 590 (1975), the Court held that giving a defendant his *Miranda* warnings did not *per se* and automatically purge the taint of an illegal arrest and make admissible incriminating statements made by defendant. *Miranda* warnings are designed to protect Fifth Amendment rights; the Fourth Amendment is satisfied only by a showing that the statements were made voluntarily and sufficiently an act of free will as to purge the primary taint, a determination to be made upon consideration of all the circumstances, particularly the temporal proximity of the arrest and statement, the presence of intervening circumstances, and the purposes and flagrancy of the official misconduct.

**[P. 1048, in text following N. 13, add:]**

However, a suspect arrested without a warrant, upon an information signed by a prosecutor or by police officers, is entitled to a prompt, nonadversary hearing before a magistrate under procedures designed to provide a fair and reliable determination of probable cause in order to keep the arrestee in custody.[1.6] Thus, the full panoply of due process required rights—counsel, confrontation, cross-examination, compulsory process for witnesses—is not required since what is to be determined at the hearing is whether the evidence supports a reasonable belief in guilt, the same determination the magistrate would make in deciding whether to issue a warrant prior to arrest.

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[1.6] *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). Justices Stewart, Douglas, Brennan, and Marshall did not join the opinion of the Court with respect to procedure but noted their concern that the opinion did not require sufficient due process protection in the hearing. Id., 126.

**[P. 1048, add to N. 14:]**

But detention of a suspect without probable cause for custodial interrogation, whether it is characterized as an arrest or some other form of seizure, is so intrusive that it violates the Fourth Amendment. *Dunaway* v. *New York*, 442 U.S. 200 (1979). Whether a seizure has occurred is not a determination that the Court can always agree on. See *United States* v. *Mendenhall*, 446 U.S. 544 (1980); *Reid* v. *Georgia*, 448 U.S. 438 (1980).

**[P. 1049, in text following N. 19, add:]**

*Camara* and *See* were reaffirmed in *Marshall* v. *Barlow's, Inc.*,[1.8] in which the Court held violative of the Fourth Amendment a provision of the Occupational Safety and Health Act which authorized federal inspectors to search the work area of any employment facility covered by the Act for safety hazards and violation of regulations without a warrant or other legal process. No exception for "pervasively regulated businesses" was to be recognized, the Court held; the exceptions are limited to those having a history of government oversight, such as firearms and liquor. To extend the exception to any business in commerce subject to congressional regulation would swallow the rule. But in obtaining warrants, inspectors are not required to

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[1.8] 436 U.S. 307 (1978).

establish probable cause in the criminal law sense; specific evidence of an existing violation may be sufficient as would be reasonable legislative or administrative standards for conducting an inspection with respect to a particular establishment.[2.5]

Similarly, in *Michigan* v. *Tyler*, [3.5] the Court subdivided the process by which an investigation of the cause of a fire may be conducted. Entry to fight the fire is of course an exception based on exigent circumstances and no warrant or consent is needed; firemen on the scene may seize evidence relating to the cause under the plain view doctrine. Additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches. Evidence of arson discovered in the course of such an administrative inspection is admissible at trial, but if the investigator finds probable cause to believe that arson has occurred and requires further access to gather evidence for a possible prosecution, he must obtain a criminal search warrant.[4.5]

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[2.5] "A warrant showing that a specific business had been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources such as, for example, dispersion of employees in various types of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employer's Fourth Amendment rights." Id., 321. Dissenting, Justice Stevens, joined by Justices Blackmun and Rehnquist, argued that not the warrant clause but the reasonableness clause should govern such administrative inspections and that the warrant clause could not be constitutionally diluted through the authorization of less than probable cause for issuance of warrants. Id., 325.

[3.5] 436 U.S. 499 (1978).

[4.5] The Court further held that after the fire was extinguished and fire investigators because of the dark, steam, and smoke were unable to investigate at the moment, it was proper for them to leave and to return at daylight without any necessity of complying with its mandate for administrative or criminal investigative warrants; the morning entry was deemed an actual continuation of the first. Id., 510–511. Justices White and Marshall dissented on this point. Id., 514.

**[P. 1049, in text following N. 21, add:]**

Expansion of the noncriminal rationale has occurred with respect to police inventories and inspections of automobiles for purposes of protection of the owner's property or in the interests of public safety.[21.5]

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[21.5] In *South Dakota* v. *Opperman*, 428 U.S. 364 (1976), the automobile had been impounded from a public street for multiple parking violations. In the police lot, certain valuables had been observed in plain view, the car was entered and searched in order that an inventory might be made of all property, and marijuana was discovered in the glove compartment. In *Cady* v. *Dombrowski*, 413 U.S. 433 (1973), a warrantless search of an out-of-state policeman's automobile, following an accident, in order to find his service revolver, was sustained when evidence of a crime was discovered. Multiple bases for upholding both searches were offered, including the particular nature of automobiles, but the noncriminal purposes of the searches were evidently critical. Particular emphasis was also given to the inability to obtain warrants based on probable cause inasmuch as there was in neither case a suspicion of crime on which to premise a showing of probable cause.

## Searches and Seizures Pursuant to Warrant

### [P. 1050, add to N. 3:]

A defendant, the Court has now held, is entitled in a suppression hearing to challenge the veracity of the statement used by the police to procure a search warrant. *Franks* v. *Delaware*, 438 U.S. 154 (1978). But the Court hedged the right closely. The affidavit is presumed valid. Before obtaining a hearing, the challenger must allege deliberate falsehood or reckless disregard for the truth and accompany the allegations with an offer of proof. Allegations should be particularized and affidavits or sworn or otherwise reliable statements of witnesses must be presented or their absence satisfactorily explained. If these requirements are met but the challenged materials would not cause the finding of probable cause to be altered if disregarded, there is to be no hearing. Justice Rehnquist and Chief Burger dissented. Id., 180.

### [P. 1054, add to N. 25:]

See also *Andresen* v. *Maryland*, 427 U.S. 463, 479–482 (1976): but see id., 484, 492–493 (Justice Brennan dissenting).

### [P. 1055, add to N. 3:]

But the First Amendment does not bar the issuance or execution of a warrant to search a newsroom, *Zurcher* v. *Stanford Daily*, 436 U.S. 547, (1978), although the Court appeared to suggest that a magistrate asked to issue such a warrant should guard against interference with press freedom through limits on type, scope, and intrusiveness of the search, id., 566, a matter made express by Justice Powell. Id., 568 (concurring).

### [P. 1056, following N. 9, in text, add:]

Seizure of materials arguably protected by the First Amendment, as are books and films, is a form of prior restraint that requires observance strictly of the Fourth Amendment. Thus, the seizure of a film without a warrant issued by a neutral magistrate upon the conclusions of the police officer is invalid; seizure cannot be justified as incidental to arrest, inasmuch as the determination of obscenity may not be made by the officer himself.[2.8] However, no pre-seizure adversary hearing is required. In the case of a film, when it is seized in order to preserve it as evidence pursuant to a warrant issued after a determination of probable cause by a neutral magistrate, with an adversary hearing assured to provide a prompt judicial determination of the obscenity issue, the seizure is constitutionally permissible. Until there is a judicial determination of obscenity, the film may continue to be exhibited and if no other copy is available either a copy of it must be made from the seized film or the film itself must be returned.[2.9]

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[2.8] *Roaden* v. *Kentucky*, 413 U.S. 496 (1973). See also *Lo-Ji Sales* v. *New York*, 442 U.S. 319 (1979); *Walter* v. *United States*, 447 U.S. 649 (1980).

[2.9] *Heller* v. *New York*, 413 U.S. 483 (1973).

### [P. 1056, add to N. 14:]

Nonsuspects, that is, third parties not suspected of culpability in crime, are subject to the issuance and execution of a warrant for the search and seizure of evidence, a development that *Hayden* made possible. *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 553–560 (1978). "The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." Id., 556. Justice Stevens argued that *Hayden* necessitated a different standard when nonsuspects were involved, that it was unreasonable to subject their privacy to invasion unless it were shown that they might not comply with a less intrusive method, such as subpoena. Id., 577.

### [P. 1057, add to N. 18:]

*Cupp* v. *Murphy*, 412 U.S. 291 (1973), upheld the warrantless taking of scrapings from defendant's fingernails at the stationhouse to which he had come voluntarily and while he was not arrested. The Court held that the very limited intrusion was undertaken to preserve highly evanescent evidence and was within an exception to the Fourth Amendment.

Grand jury subpoenas compelling certain parties to produce voice and handwriting exemplars were held not to be governed by the Fourth Amendment. There is no reasonable expectation of privacy with respect to these items. *United States* v. *Dionisio*, 410 U.S. 1 (1973); *United States* v. *Mara*, 410 U.S. 19 (1973).

### [P. 1057, add to N. 19:]

Evidence of a "testimonial" nature, i.e., business records in one's handwriting, is seizable under warrant and, subject to a privilege against self-incrimination assertion, subpoena, *Andresen* v. *Maryland*, 427 U.S. 463 (1976); *Fisher* v. *United States*, 425 U.S. 391 (1976). The question of a private papers exception to seizure continues to be the subject of reservations in opinions, *Fisher*, *supra*, 401; *United States* v. *Miller*, 425 U.S. 435, 440, 444 (1976); *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 78–79 (1974) (Justice Powell concurring), but the privilege, if there be one, now seems to be viewed by the Court as a Fifth Amendment one and the analysis of *Fisher*, *supra*, 405–414, seems to lead to a rejection of its assertion.

### [P. 1058, add to N. 24:]

*Boyd* has now been stripped of both its precise holding and its broad dicta. Thus, in *Fisher* v. *United States*, 425 U.S. 391, 408 (1976), it is stated that "the precise claim sustained in *Boyd* would now be rejected for reasons not there considered." Similarly the analysis in *Fisher*, *supra*, 405–414, and *Andresen* v. *Maryland*, 427 U.S. 463 (1976), for the most part dispenses with the theory of a "convergence" of Fourth and Fifth Amendment rights.

### [P. 1058, add to N. 25:]

It seems, however, that a constitutional difference may exist between search warrants and subpoenas insofar as self-incrimination rights are concerned. *Fisher* v. *United States*, 425 U.S. 391 (1976); *Andresen* v. *Maryland*, 427 U.S. 463 (1976).

### [P. 1059, add to N. 1:]

See *Gooding* v. *United States*, 416 U.S. 430 (1974).

**[P. 1060, in text following N. 7, add:]**

Police officers executing a warrant authorizing search of premises and of named persons present on those premises cannot automatically constitutionally search someone found on the premises. If they can articulate some reasonable basis for fearing for their safety from the bystander they may conduct a *Terry* "patdown", but they must have probable cause particularized with respect to that person.[1.5]

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[1.5] *Ybarra* v. *Illinois*, 444 U.S. 85 (1979). Chief Justice Burger and Justices Blackmun and Rehnquist dissented. Id., 96, 98.

## Valid Searches and Seizures Without Warrants

**[P. 1062, add to N. 13:]**

*Pennsylvania* v. *Mimms*, 434 U.S. 106 (1977), represents another extension of *Terry*, holding that when a police officer validly stops an automobile because of a traffic violation he may, without the necessity of any grounds for suspecting the driver of any further crimes or any basis that could be articulated for fearing for his safety, direct the driver to get out of the car. In this case, after the driver was out of the vehicle, the officer noticed a bulge under his jacket which then gave him a *Terry* basis for frisking him and discovering a weapon.

In *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), the Court approved as consistent with the Fourth Amendment brief check point stops near the Nation's borders in order that a brief questioning of the occupants of automobiles could be carried out in the absence of any individualized suspicion that any particular vehicle contained illegal aliens.

**[P. 1062, in text following paragraph with N. 14, add:]**

The *Terry* test of the permissibility of intrusions of lesser scope than arrests or searches has evolved into the standard of "reasonable suspicion of criminal activity." The test permits some stops and questionings without probable cause in order to allow police officers to explore the foundations of their suspicions. While the Court has gone beyond the weapons pat-down and concern for officer safety, it has not elaborated a set of rules governing the application of the test and the trend has seemed to be one of restrictive application.[1.5] The most recent cases reach contrary results on essentially similar facts and leave the scope of the test open to conflicting interpretation. Thus, in *United States* v. *Mendenhall*,[2.5] a divided Court held valid the initial stop of

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[1.5] See *Ybarra* v. *Illinois*, 444 U.S. 85 (1979) (no reasonable suspicion to justify a frisk of a barroom patron on the premises when police arrived to execute a search warrant); *Dunaway* v. *New York*, 442 U.S. 200 (1979) (probable cause, not reasonable suspicion, necessary to permit detention for custodial interrogation); *Delaware* v. *Prouse*, 440 U.S. 650 (1979) (reasonable suspicion that there is a license or registration violation necessary to authorize automobile stop; random checks impermissible); *Brown* v. *Texas*, 443 U.S. 47 (1979) (individual's presence in high crime area gave officer no articulable grounds for reasonable suspicion with respect to him).

[2.5] 446 U.S. 544 (1980). Two of the majority Justices thought that the stop did not constitute a seizure and thus was not required to be justified. Id., 551–557. The a disembarking airline passenger, although the Justices in the majority were divided with respect to the reasons for its validity, and approved a subsequent search because of the passenger's consent. But in *Reid* v. *Georgia*,[5.5] decided a few days later, a stop and detention of two air line passengers was held not justified by a reasonable suspicion.

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other three majority Justices thought there was a seizure which was justified by the officers' reasonable suspicion of criminal activity. Id., 560. The four dissenters thought there was a seizure but that sufficient facts were lacking to constitute reasonable suspicion. Apparently, the entire Court agreed "that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Id., 554. See id., 560 n. 1 (Justice Powell concurring), 569–571 (Justice White dissenting), although other aspects of the dissent suggest that all intrusions by the police constitute seizures.

[5.5] 448 U.S. 438 (1980). A majority assumed that a seizure had occurred but that facts sufficient to create a reasonable suspicion were lacking. Three Justices concurred, noting that the lower courts had not considered whether there was a seizure which could be taken up on remand, and one Justice dissented on the basis of *Mendenhall*.

**[P. 1062, in text following N. 15, add:]**

However, the permissibility of a thorough search of the person of one arrested for a traffic offense, in the course of which heroin was discovered, has recently divided the Court.[1.5] The lower court and the dissenting Justices had taken the view that inasmuch as exceptions to the warrant requirement were to be narrowly construed, the person of the arrestee for a crime for which no evidence could be discovered could be thoroughly searched only upon a reasonable suspicion that the individual might be armed, a fact that ordinarily could be determined by a frisk. But the Court held that a custodial arrest of a suspect based upon probable cause is a reasonable intrusion under the Fourth Amendment and a search incident to the arrest requires no additional justification.[2.5]

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[1.5] *United States* v. *Robinson*, 414 U.S. 218 (1973). Justices Marshall, Douglas, and Brennan dissented.

[2.5] The officer was required under applicable regulations to arrest Robinson, but in *Gustafson* v. *Florida*, 414 U.S. 260 (1973), the Court adhered to its rule even though the arrest was for an offense for which a citation would have normally been issued, the lawfulness of the arrest not having been challenged. Id., 266 (Justice Stewart concurring).

In *United States* v. *Edwards*, 415 U.S. 800 (1974), the warrantless seizure for examination of defendant's clothing several hours following the time he had been arrested and placed in a cell was upheld as incident to the arrest, the delay being found not unreasonable because substitute clothing was not available for some time.

**[P. 1063, add to N. 23]**

*Chimel* was reaffirmed in *Mincey* v. *Arizona*, 437 U.S. 385 (1978), when the Court held unconstitutional a warrantless search (extending over four days, but the length was not emphasized by the Court as an aggravating factor) of the apartment of a suspect who had fatally wounded a police officer attempting to arrest him in a drug case, the suspect having been wounded and removed to a hospital. See id., 391–392. The case rejects a state court created "murder scene exception" to the Fourth Amendment, under which warrantless searches of premises on which homicides had occurred were permissible. Id., 394–395.

**[P. 1064, in text following N. 24, add:]**

Emphasizing the reasonable expectation of privacy of one in his luggage or other baggage, the Court has held that, once police have arrested a suspect and immobilized him, validly seized bags are not, merely because they are validly seized, subject to search without a warrant.[2.5] The decisions have spawned in the lower courts a vast amount of litigation over what kinds of bags and packages one may have a justifiable expectation of privacy in.[4.5]

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[2.5] *United States* v. *Chadwick*, 433 U.S. 1 (1977) (footlocker); *Arkansas* v. *Sanders*, 442 U.S. 753 (1979) (luggage).

[4.5] E.g., *United States* v. *Benson*, 631 F. 2d 1336 (C.A. 8, 1980) (tote bag); *United States* v. *Brown*, 635 F. 2d 1207 (C.A. 5, 1980) (paper bag); *United States* v. *Bella*, 605 F. 2d 160 (C.A. 5, 1979) (guitar case).

**[P. 1064, add to N. 25:]**

See *Cardwell* v. *Lewis*, 417 U.S. 583, 591 n. 7, 590 n. 4 (1974). But see *United States* v. *Edwards*, 415 U.S. 800 (1974).

**[P. 1064, in text following N. 2, add:]**

To the mobility rationale, the Court has added the consideration that "the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property."[1.5] Application of the principles to vehicular seizures and searches has led to considerable division within the Court. Random stops of motorists on the highways to check

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[1.5] *Arkansas* v. *Sanders*, 442 U.S. 753, 761 (1979); *United States* v. *Chadwick*, 433 U.S. 1, 12–13 (1977). Chief Justice Burger and Justices Blackmun, Rehnquist, and Stevens appear to believe that automobiles are vastly less protected than homes and more subject to warrantless searches. See *Cardwell* v. *Lewis*, 417 U.S. 583, 590–591 (1974) (plurality opinion); *United States* v. *Ortiz*, 422 U.S. 891, 896 (1975); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561, (1976); *South Dakota* v. *Opperman*, 428 U.S. 364, 367–368 (1976); *Arkansas* v. *Sanders*, *supra*, 766 (concurring opinion), 769 (dissenting opinion). Justice Powell subscribes to the premise but would carry it less far than these Justices. See esp. *South Dakota* v. *Opperman*, *supra*, 378–380 (concurring), and his opinions for the Court in the border search cases. Justice White has joined opinions accepting the views of the four, e.g., *Cardwell*, and see his dissent in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 510 (1971), but his dissent in *Opperman*, *supra*, 396, may signify less than full adherence to the view. Justices Brennan, Stewart, and Marshall reject the view while adhering to the *Carroll* exception language. *Opperman*, *supra*, 384; *Cardwell*, *supra*, 596. Note the relative unanimity in the assertion of the privacy interest in *Delaware* v. *Prouse*, 440 U.S. 648, 662–663 (1979).

license and vehicle registrations were condemned as unreasonably violative of justifiable expectations of privacy.[6.5] Measuring the degree of invasion of privacy, the Court has formulated different rules with respect to searches of or the questioning of passengers in automobiles in the context of border searches carried out away from but in proximity to the Nation's borders.[6.6] The propriety of the warrantless seizure of defendant's automobile from a public parking lot several hours after his arrest, its transportation to a police impoundment lot, and the taking of tire casts and exterior paint scrapings evenly divided the Justices.[6.7] No Fourth Amendment violations were found with respect to police "searches" of two automobiles, and the discovery of criminal evidence, when police purposes were noncriminal connected and were justifiable in terms of protection of public safety and the owner's property.[6.8] Because passengers in an automobile had no reasonable expectations of privacy in the glove compartment and the area under the seat, their Fourth Amendment rights had not been violated and they could not move to suppress evidence found in those places.[6.9] But just because luggage may have been seized while it was in an automobile which was lawfully stopped is no reason to deny the reasonable expectation of privacy the owner or possessor of the luggage may have felt and it may not be searched under the automobile exception without a warrant.[7.1]

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[6.5] *Delaware v. Prouse*, 440 U.S. 648 (1979).

[6.6] *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Ortiz*, 422 U.S. 891 (1975); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

[6.7] *Cardwell v. Lewis*, 417 U.S. 583 (1974).

[6.8] *Cady v. Dombrowski*, 413 U.S. 433 (1973); *South Dakota v. Opperman*, 428 U.S. 364 (1976).

[6.9] *Rakas v. Illinois*, 439 U.S. 128 (1978).

[7.1] *United States v. Chadwick*, 433 U.S. 1 (1977); *Arkansas v. Sanders*, 442 U.S. 753 (1979).

**[P. 1065 add to N. 3:]**

The vitality of the statement is open to question after *Cardwell v. Lewis*, 417 U.S. 583 (1974), and *South Dakota v. Opperman*, 428 U.S. 364 (1976), but neither decision expressly calls into account the rule.

**[P. 1065, add to N. 5:]**

The exceptions seem to have swallowed the rule. In *Texas v. White*, 423 U.S. 67, 68 (1975), the Court read *Chambers* as holding "that police officers with probable cause to search an automobile on the scene where it was stopped could constitutionally do so later at the station house without first obtaining a warrant."

**[P. 1065, following N. 8 in text, add:]**

In *Schneckloth v. Bustamonte*,[8.1] the Court dealt for the first time with the standards for determining the voluntariness of consent to a warrantless search. Adopting the standards of voluntariness utilized by it in the confession cases prior to *Miranda*,[2.4] it held that reviewing courts must determine on the basis of the totality of all the circumstances whether consent has been freely given or has been coerced. The Court rejected the contention that knowledge of the right to refuse consent was essential to the issue of voluntariness, so that the prosecution would have to prove such knowledge or the police in asking for consent would have to give warnings similar to those required in *Miranda* to acquaint a person with his rights. Consent was not equated with "waiver" which would have brought into play the principle that a "waiver" of constitutional rights must be based upon "an intentional relinquishment or abandonment of a known right or privilege."[2.5]

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[2.3] 412 U.S. 218 (1973). Justices Douglas, Brennan, and Marshall, dissenting, would have required a showing of awareness of the right to refuse to establish the validity of consent. Id., 275, 276, 277. At several points, the Court expressly limited its holding to situations in which the subject of the search is not in custody, invoking the rationale of *Miranda* that custodial interrogation is inherently coercive, id., 232, 240–241, 246–248, and reserved the question of standards when the suspect is in custody. Id., 240 n. 29. But in *United States* v. *Watson*, 423 U.S. 411, 424–425 (1976), the fact that consent had been given while defendant was in custody, on a public street and not in the police station, to be sure, was deemed to be of no significance. See also *United States* v. *Mendenhall*, 446 U.S. 544, 557–559 (1980).

See also *United States* v. *Matlock*, 415 U.S. 164 (1974) (dealing with the standards for determining whether the woman with whom defendant was living had authority to consent to a search of a commonly-shared bedroom).

[2.4] *Miranda* v. *Arizona*, 384 U.S. 436 (1966). *See text*, pp. 1122–1134.

[2.5] 412 U.S. 235–246, quoting from *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). *See text, p. 1217. Bustamonte* limits *Johnson* v. *Zerbst* to a waiver of those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial. The Fourth Amendment, the Court said, is aimed at preserving other values for which the waiver doctrine is inappropriate of application.

**[P. 1066, add to N. 11:]**

See *Air Pollution Variance Bd.* v. *Western Alfalfa Corp.*, 416 U.S. 86 (1974).

**[P. 1066, add to N. 13:]**

Note that in *United States* v. *Santana*, 427 U.S. 38 (1976), the Court considerably expands the "plain view" "open fields" doctrines to apply them to the situation of a person standing in the doorway of her home in public view.

**[P. 1066, add to N. 14:]**

See also *United States* v. *Ramsey*, 431 U.S. 606, 616–619 (1977) (government interest in controlling entry of contraband outweighs individual privacy interest in incoming mail and justifies border search of suspicious packages).

**[P. 1066, in text following N. 15, add:]**

In a series of decisions the Court rationalized the border search doctrine, in terms of inland stoppings and searchings, and laid down the Fourth Amendment standards governing them. Thus, in *Almeida-Sanchez* v. *United States*,[1.5] the Court approved the principle of border searches absent warrants and probable cause as a condition of the privilege of crossing the Nation's borders, but it held that the warrantless stopping and searching of defendant's automobile on a highway some 20 air miles from the border by a roving patrol lacking probable cause to believe that the vehicle contained illegal aliens violated the Amendment.[2.5] While agreeing that a fixed checkpoint at which traffic moving away from border areas could be stopped probably gave motorists less cause for alarm than did roving patrols, the Court nonetheless held that the invasion of privacy entailed in a search was just as intrusive and must be justified by a showing of probable cause or consent.[3.5] However, when motorists are briefly stopped, not for purposes of a search but in order that officers may inquire into their residence status, either by asking a few questions or by checking papers, different results are achieved. Thus, roving patrols, because the interference with Fourth Amendment rights are "modest" and the law enforcement interests served significant may stop vehicles for purposes of a brief inquiry provided they are "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that an automobile contains illegal aliens.[4.5] And at fixed checkpoints, officers may halt vehicles briefly in order to question occupants even in the absence of any individualized suspicion that the particular vehicle contains illegal aliens.[5.5]

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[1.5] 413 U.S. 266 (1973). Justices White, Blackmun, Rehnquist, and Chief Justice Burger would have found the search reasonable upon the basis of congressional approval of such roving searches as the only effective means to police border smuggling. Id., 285.

[2.5] Because of the automobile and border search qualifications to the Fourth Amendment's warrant requirement, warrantless searches were constitutional so long as probable cause existed. Justice Powell argued for a general warrant authority not tied to particular vehicles, id., 275, *supra*, p. S122, but the Court has not yet had occasion to pass on a specific case. See *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 547 n. 2, 562 n. 15 (1976).

[3.5] *United States* v. *Ortiz*, 422 U.S. 891 (1975).

[4.5] *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975). However, the Court held insufficiently justified the stopping of defendant's automobile solely because the officers observed the Mexican appearance of the occupants. Mexican appearance alone "would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country." Id., 886.

[5.5] *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976). The Court deemed the intrusion on Fourth Amendment interests to be quite limited, even if officers should act on the basis of the appearance of the occupants, whereas the elimination of the practice would deny to the Government its only practicable way to apprehend smuggled aliens and to deter the practice. Justices Brennan and Marshall dissented. Id., 567.

## Electronic Surveillance

### [P. 1072, add to N. 19:]

The Court has interpreted the statute several times without reaching the constitutional questions. *United States* v. *Kahn*, 415 U.S. 143 (1974); *United States* v. *Giordano*, 416 U.S. 505 (1974); *United States* v. *Chavez*, 416 U.S. 562 (1974); *United States* v. *Donovan*, 429 U.S. 413 (1977); *Scott* v. *United States*, 436 U.S. 128 (1978); *Dalia* v. *United States*, 441 U.S. 238 (1979). See also *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977); *United States* v. *Caceres*, 440 U.S. 741 (1979). *Dalia*, *supra*, did pass on one constitutional issue, whether the Fourth Amendment mandated specific warrant authorization for a surreptitious entry to install an authorized "bug." And see *Smith* v. *Maryland*, 442 U.S. 735 (1979) (no reasonable expectation of privacy in numbers dialed on one's telephone, so Fourth Amendment does not require a warrant to install "pen register" to record those numbers).

### [P. 1073, add to N. 22:]

The question of the scope of the President's constitutional powers, if any, to conduct electronic surveillance in respect to foreign agents or the like in this country remains judicially unsettled. See the diverse opinions in *United States* v. *Butenko*, 494 F. 2d 593 (C.A. 3), *cert. den.*, 419 U.S. 881 (1974); *Zweibon* v. *Mitchell*, 516 F. 2d 594 (C.A.D.C. 1975), *cert den.*, 425 U.S. 944 (1976). But Congress in the Foreign Intelligence Surveillance Act of 1978, P.L. 95-511, 92 Stat. 1797, amending 18 U.S.C. § 2511, substantially limits the President's powers by requiring warrants for most surveillance conducted within the United States for foreign intelligence purposes.

### [P. 1082, following N. 19 in text, add:]

A majority of the Supreme Court now appears to reject all doctrinal bases for the exclusionary rule except the purpose of deterring police violations of Fourth Amendment rights[1.5] and to have considerable doubts that deterrence is served by enforcement of the rule.[2.5] While some Justices continue to argue for judicial discarding of the

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[1.5] Deterrence is the "prime purpose" of the rule, "if not the sole one". *United States* v. *Janis*, 428 U.S. 433, 446 (1976); *United States* v. *Calandra*, 414 U.S. 338, 347-348 (1974); *United States* v. *Peltier*, 422 U.S. 531, 536-539 (1975); *Stone* v. *Powell*, 428 U.S. 465, 486 (1976); *Rakas* v. *Illinois*, 439 U.S. 128, 134 n. 3, 137-138 (1978); *Michigan* v. *DeFillippo*, 443 U.S. 31, 38 n. 3 (1979). "The primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution. In the Fourth Amendment area, however, the evidence is unquestionably accurate, and the violation is complete by the time the evidence is presented to the court. . . . The focus therefore must be on the question whether the admission of the evidence encourages violations of Fourth Amendment rights. As the Court has noted in recent cases, this inquiry is essentially the same as the inquiry into whether exclusion would serve a deterrent purpose." *United States* v. *Janis*, *supra*, 458 n. 35; *United States* v. *Calandra*, *supra*, 347, 354, *United States* v. *Peltier*, *supra*, 536; *Michigan* v. *Tucker*, 417 U.S. 433, 450 n. 25 (1974).

[2.5] *United States* v. *Janis*, 428 U.S. 433, 448-454 (1976), contains a lengthy review of the literature on the deterrent effect of the rule and is informed by doubts about such effect. See also *Stone* v. *Powell*, 428 U.S. 465, 492 n. 32 (1976).

rule,[3.5] the Court holds that considerations of deterrence, when properly applied, call for its continued utilization to exclude evidence at trial and on direct appeal, although federal *habeas corpus* will no longer be available to state prisoners to collaterally attack convictions based on allegedly unconstitutional searches and seizures unless they claim that state courts did not afford them a fair and full opportunity to litigate their Fourth Amendment claims.[4.5] In other than criminal trial situations, the Court will evaluate the interests served by admissibility against the contribution to deterrence in determining whether to admit evidence unlawfully obtained.[5.5] The continuing trend is toward narrowing the scope of the rule and the occasions for its use, leading perhaps to its abandonment.

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[3.5] *Stone* v. *Powell*, 428 U.S. 465, 496 (1976) (Chief Justice Burger, who had previously argued for abandonment of the rule when a replacement remedy, such as a damage action, was in place, now argues that existence of the rule hampers the search for another remedy and ought simply to be discarded.) See id., 536 (Justice White: "rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for his belief.") The "good faith" of police officers is cited as a factor in a number of cases. E.g., *United States* v. *Janis*, 428 U.S. 433, 447, 458 n. 35 (1976). See, on the possible beginning acceptance of a good faith test, albeit in very special circumstances, *Michigan* v. *DeFillippo*, 443 U.S. 31 (1979).

[4.5] *Stone* v. *Powell*, 428 U.S. 465 (1976).

[5.5] Thus, *United States* v. *Calandra*, 414 U.S. 338 (1974), held that a witness summoned to appear and testify before a grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure. *United States* v. *Janis*, 428 U.S. 433 (1976), held that federal tax authorities could use in a civil proceeding evidence found to have been unconstitutionally seized from defendant by state authorities.

### [P. 1082, add to N. 20:]

See *Brown* v. *Illinois*, 422 U.S. 590 (1975); *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980).

### [P. 1083, add to N. 21:]

*United States* v. *Calandra*, 414 U.S. 338 (1974), vitiates much of the *Silverthorne* holding and dicta. See also *United States* v. *Havens*, 446 U.S. 620 (1980).

### [P. 1083, add to N. 22:]

In *United States* v. *Ceccolini*, 435 U.S. 268 (1978), the Court held that the exclusion of the testimony of a witness discovered through an illegal search is not to be tested by the same standard that the exclusion of an inanimate object would be tested. Applying an "attenuation analysis," the Court held that because a witness was freely willing to testify and therefore more likely to come forward, the application of the exclusionary rule was not likely to deter illegal searches; similarly, excluding such testimony would perpetually disable a witness from giving relevant and material evidence, regardless of how unrelated the testimony might be to the original illegal search.

**[P. 1086, in text following N. 12, add:]**

Departing from its previous approach, the Court now holds that "standing" to invoke the exclusionary rule serves no useful analytical purpose. Henceforth, the issue of exclusion is to be determined upon a resolution of the substantive matter whether the claimant's Fourth Amendment rights have been violated, which telescopes the inquiry into one analysis rather than two but does not in and of itself occasion any different result. "We can think of no decided cases of this Court that would have come out differently had we concluded . . . that the type of standing requirement . . . reaffirmed today is more properly subsumed under substantive Fourth Amendment doctrine. Rigorous application of the principle that the rights secured by this Amendment are personal, in place of a notion of 'standing,' will produce no additional situations in which evidence must be excluded. The inquiry under either approach is the same."[1.5] Henceforth, "the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect."[2.5]

Nonetheless, because the Court continues to use the rubric of "standing" in the course of passing on exclusion claims and because the analysis is the same, those issues will continue to be treated at this point.

Emphasis upon the "personal" nature of Fourth Amendment rights means that only if one's own rights are violated will one be heard to move to exclude, regardless of the nature of the violation.[3.5] However, at the same time the Court has been moving the doctrinal place in which is lodged the standards for determining who can move to suppress, it has reinterpreted past rules to narrow considerably the numbers of people who will be able to complain. Thus, redefinition of the protected interest basis of the Amendment in terms of "justifiable expectations of privacy" has in many instances resulted in holdings that because an expectation was not justifiable no interest was violated and therefore evidence is admissible which would have previously been excluded.

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[1.5] *Rakas* v. *Illinois*, 439 U.S. 128, 139 (1978).

[2.5] Id., 140.

[3.5] *United States* v. *Payner*, 447 U.S. 727 (1980), held it impermissible for a federal court under its supervisory power to police the administration of justice in the federal system to suppress otherwise admissible evidence on the ground that federal agents had flagrantly violated the Fourth Amendment rights of third parties in order to obtain evidence to use against others when the agents knew that the defendant would not be able to challenge their conduct under the Fourth Amendment.

Disavowing the "legitimately on premises" language of *Jones*, the Court held that passengers in an automobile had no reasonable expectation of privacy in the glove compartment and the area under the seats so that they could not object to evidence being admitted which was found there in an unconstitutional search, unconstitutional, that is, as to the automobile's owner or person in possession who was not on trial.[4.5] Subsequently, the Court overturned the rule that if one were charged with the crime of possession he had "automatic standing" to object to the admissibility of those items if the search had been in violation of the Fourth Amendment.[5.5] And it was also determined that even if one owned property which had been seized in violation of the Amendment one could not move to exclude such evidence from his trial if the search had not infringed his legitimate expectation of privacy.[6.5]

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[4.5] *Rakas v. Illinois*, 439 U.S. 128 (1978). The actual result in *Jones v. United States*, 362 U.S. 257 (1960), was preserved, because *Jones* was using the premises with permission, he had a key, his luggage was there; he had a right to exclude others and thus a legitimate expectation of privacy. But *Rakas* and his fellow passenger asserted neither a property nor a possessory interest in the automobile which had been invaded by the search.

[5.5] *United States v. Salvucci*, 448 U.S. 83 (1980), overruling *Jones v. United States*, 362 U.S. 257 (1960), in this respect. *Jones* had reasoned that one charged with possession should be given automatic standing in order to spare him the dilemma of asserting ownership at the suppression hearing and then finding his admission of ownership used against him at trial. *Simmons v. United States*, 390 U.S. 377 (1968), had barred such use of one's suppression testimony and the other reasons for the rule were similarly deemed no longer valid. The evidence in *Salvucci* was a number of stolen checks found in an illegal search of the apartment of the mother of one of the defendants.

[6.5] *Rawlings v. Kentucky*, 448 U.S. 98 (1980). Fearing an eminent police search, defendant had deposited containers of various drugs in a companion's purse, where they were discovered in the course of an illegal search. Because defendant had no legitimate expectation of privacy in his companion's purse, the search did not violate *his* Fourth Amendment rights, even though he claimed ownership of the drugs.

# AMENDMENT 5—RIGHTS OF PERSONS

## Indictment by Grand Jury

**[P. 1080, in text following N. 5, add:]**

The investigatory powers of grand juries were substantially extended by the Court in recent decisions. It was held that the exclusionary rule was inapplicable in grand jury proceedings with the result that a witness called before a grand jury could be questioned on the basis of knowledge obtained through the use of illegally-seized evidence.[1.5] In thus allowing the use of evidence obtained in violation of the Fourth Amendment, the Court nonetheless restated the principle that, while free of many rules of evidence that bind trial courts, grand juries are not unrestrained by constitutional considerations.[2.5] A witness called before a grand jury is not entitled to be informed that he may be indicted for the offense under inquiry [3.5] and the commission of perjury by a witness before the grand jury is punishable, irrespective of the nature of the warning given him when he appears and regardless of the fact that he may be a putative defendant already when he is called.[4.5]

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[1.5] *United States* v. *Calandra*, 414 U.S. 338 (1974). Justices Brennan, Douglas, and Marshall dissented, id., 355.

[2.5] "Of course, the grand jury's subpoena is not unlimited. It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law. . . . Although, for example, an indictment based on evidence obtained in violation of a defendant's Fifth Amendment privilege is nevertheless valid . . . the grand jury may not force a witness to answer questions in violation of that constitutional guarantee. . . . Similarly, a grand jury may not compel a person to produce books and papers that would incriminate him. . . . The grand jury is also without power to invade a legitimate privacy interest protected by the Fourth Amendment. A grand jury's subpoena duces tecum will be disallowed if it is 'far too sweeping in its terms to be regarded as reasonable under the Fourth Amendment.' *Hale* v. *Henkel*, 201 U.S. 43, 76 (1906). Judicial supervision is properly exercised in such cases to prevent the wrong before it occurs." Id., 346. See also *United States* v. *Dionisio*, 410 U.S. 1, 11–12 (1973).

[3.5] *United States* v. *Washington*, 431 U.S. 181 (1977). Justices Brennan and Marshall dissented. Id., 191. Because defendant when he appeared before the grand jury was warned of his rights to decline to answer questions on the basis of self-incrimination, the decision was framed in terms of those warnings, but the Court twice noted that it had not decided, and was not deciding, "whether any Fifth Amendment warnings whatever are constitutionally required for grand jury witnesses. . . ." Id., 186, 190.

[4.5] *United States* v. *Mandujano*, 425 U.S. 564 (1976); *United States* v. *Wong*, 431 U.S. 174 (1977). Mandujano had been told of his right to assert the privilege against self-incrimination, of the consequences of perjury, and of his right to

Of greater significance were two cases in which the Court held the Fourth Amendment to be inapplicable to grand jury subpoenas requiring named parties to give voice exemplars and handwriting samples to the grand jury for identification purposes.[5.5] According to the Court, the issue turned upon a two-tiered analysis—"whether either the initial compulsion of the person to appear before the grand jury, or the subsequent directive to make a voice recording is an unreasonable 'seizure' within the meaning of the Fourth Amendment."[6.5] First, a subpoena to appear was held not to be a seizure, because it entailed significantly less social and personal effront to one than did an arrest or an investigative stop and because every citizen has an obligation, which may be onerous at times, to appear and give whatever aid he may to a grand jury.[7.5] Second, the directive to make a voice recording or to produce handwriting samples did not bring the Fourth Amendment into play because no one has any expectation of privacy in the characteristics of either his voice or his handwriting.[8.5] Inasmuch as the Fourth Amendment was inapplicable, there was no necessity for the government to make a preliminary showing of the reasonableness of the grand jury requests.

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counsel, but not to have counsel with him in the jury room. Chief Justice Burger and Justices White, Powell, and Rehnquist took the position that no *Miranda* warning was required because there was no police custodial interrogation and that in any event commission of perjury was not excusable on the basis of lack of any warning. Justices Brennan, Marshall, Stewart, and Blackmun agreed that whatever rights a grand jury witness had, perjury was punishable and not to be excused. Id., 584, 609. Wong was assumed on appeal not to have understood the warnings given her and the opinion proceeds on the premise that absence of warnings altogether does not preclude a perjury prosecution. In *Mandujano*, the Chief Justice also asserted the principle that counsel may not be permitted in the grand jury room and, by noting that "no criminal proceedings had been instituted against respondent, hence the Sixth Amendment right to counsel had not come into play", cast doubt upon the existence of any constitutional requirement that a grand jury witness be permitted to consult, out of the room, with counsel at all. Id., 425 U.S., 580–581. Justices Brennan and Marshall disputed this view, id., 602–609, while Justices Stewart and Blackmun ventured no opinion. Id., 609.

[5.5] *United States* v. *Dionisio*, 410 U.S. 1 (1973); *United States* v. *Mara*, 410 U.S. 19 (1973).

[6.5] Id., 9.

[7.5] Id., 9–13.

[8.5] Id., 13–15. The privacy rationale proceeds from *Katz* v. *United States*, 389 U.S. 347 (1967).

## Double Jeopardy

**[P. 1083, in text following N. 1, add:]**

Attributable in large part, perhaps, to enactment of a new law enlarging the authority of the Federal Government to appeal in criminal cases,[1.5] the Supreme Court has decided an uncommonly large

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[1.5] In 1971, Congress enacted 18 U.S.C. 3731, Title III on the Omnibus Crime Control Act of 1970, P.L. 91–644, 84 Stat. 1890, replacing the Criminal Appeals Act of 1907, 34 Stat. 1246, that the Court had referred to as "a failure . . . , a number of double jeopardy cases and engaged in a major re-evaluation of doctrine and principle. The result has not been, however, the development of clear and consistent guidelines but rather because of the differing emphases of the Justices upon the purposes of the clause the results have more often reflected highly technical distinctions and individualistic fact patterns. Three Justices believe that the purpose of the clause is only to protect final judgments relating to culpability, either of acquittal or conviction, and that English common law rules designed to protect the defendant's right to go to the first jury picked had become confused with the double jeopardy clause; in their view, the clause properly has no role to play before final judgment.[3.4] Three Justices believe that the clause not only protects the integrity of final judgments but more important it protects the accused against the strain and burden of multiple trials, which also enhance the ability of government to convict.[3.5] The remaining three Justices fall somewhere between the other two groups and although they endorse both roles for the clause, it appears that they engage in some form of balancing of defendants' rights with society's rights to determine when reprosecution should be permitted when a trial ends prior to a final judgment not hinged on the defendant's culpability.[3.6] Thus, the basic area in which the doctrinal disagreements result in uncertain case law is the

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most unruly child that has not improved with age." *United States* v. *Sisson*, 399 U.S. 267, 307 (1970). The new law permits appeals in all criminal cases in which indictments are dismissed except in those cases in which the double jeopardy clause prohibits further prosecution. Thus, interpretation of the statutory language is at the same time constitutional interpretation of the clause.

[3.4] See *Crist* v. *Bretz*, 437 U.S. 28, 40 (1978) (dissenting opinion) (Justices Powell and Rehnquist and Chief Justice Burger). These Justices apparently feel that the due process clause must be relied on to prevent prosecutorial abuse through some prejudicial action designed to abort the trial and to obtain a second trial. Id., 50. But *see United States* v. *Scott*, 437 U.S. 82, 92–94 (1978) (Justice Rehnquist for the Court, including the Chief Justice and Justice Powell) (adverting to the role of the double jeopardy clause in protecting against such prosecutorial abuse).

[3.5] *United States* v. *Scott*, 437 U.S. 82, 101 (1978) (dissenting opinion) (Justices Brennan, White, Marshall, and Stevens). Justice Stevens is not included in the group of three because of his opinion for the Court in *Arizona* v. *Washington*, 434 U.S. 497 (1978); *see* id., 519 (Justices Marshall and Brennan dissenting), although the opinion does acknowledge the importance, "the valued right", of the defendant to have his trial completed in the one process before the one tribunal. Id., 503–504, 507–509, 514, 516.

[3.6] Thus, Justices Stewart and Blackmun have enunciated positions recognizing a broad right of defendants much like the position of the latter three Justices, *Crist* v. *Bretz*, 437 U.S. 28, 33–36 (1978) (Justice Stewart for the Court), and id., 38 (Justice Blackmun concurring), but they also joined the opinions in *United States* v. *Scott*, 437 U.S. 82 (1978), and *Arizona* v. *Washington*, 434 U.S. 497 (1978) (Justice Blackmun, however, concurring only in the result). Justice Stevens in addition to the other opinions, *supra*, n. *3.5*, joined Justice Stewart's opinion in *Crist* v. *Bretz*.

trial from the attachment of jeopardy [5.5] to the judgment of not guilty.[6.5] Prior case law must thus be assessed in the light of the changes wrought by the decisions of the last several Terms in which some lines of cases have been expressly overruled [7.5] and others undermined.[8.5]

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[5.5] On the point when jeopardy attaches, see *Crist* v. *Bretz*, 437 U.S. 28 (1978). See *Serfass* v. *United States*, 420 U.S. 377 (1975) (pretrial dismissal of charges against defendant appealable since reversal would merely lead to a first trial, not a second).

[6.5] *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977); *Sanabria* v. *United States*, 437 U.S. 54 (1978).

[7.5] See *Burks* v. *United States*, 437 U.S. 1 (1978), overruling *Bryan* v. *United States*, 338 U.S. 552 (1950); *Sapir* v. *United States*, 348 U.S. 373 (1955); *Yates* v. *United States*, 354 U.S. 298 (1957); and *Forman* v. *United States*, 361 U.S. 416 (1960), to the extent they are inconsistent, and *United States* v. *Scott*, 437 U.S. 82 (1978), overruling *United States* v. *Jenkins*, 420 U.S. 358 (1975).

[8.5] *Arizona* v. *Washington*, 434 U.S. 497 (1978), and *Illinois* v. *Somerville*, 410 U.S. 458 (1973), departed from the plurality opinion requirement of *United States* v. *Jorn*, 400 U.S. 470 (1971), that the trial judge explicitly consider alternatives to declaring a mistrial. The Court has also held that to effectuate the purposes of the double jeopardy clause, the general rule with respect to appeals from nonfinal orders must be departed from. *Abney* v. *United States*, 431 U.S. 651 (1977), held that a defendant may immediately appeal the denial of a pretrial motion to dismiss an indictment on double jeopardy grounds, rather than raise the denial as error on appeal from a conviction. Otherwise, the clause would not protect a defendant from the burden of multiple trials.

**[P. 1095, add to N. 10:]**

The federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy and applies in state courts. *Crist* v. *Bretz*, 437 U.S. 28 (1978). Justice Powell, with Chief Justice Burger and Justice Rehnquist, dissented on the basis that the clause embodies only a rule about finality of judgments and that the rule underlying the clause given voice by the Court was not a constitutional rule; even granting the rule served double jeopardy principles they would hold that jeopardy does not attach until the first evidence is presented. Id., 40. The applicability of the rule to the States had been assumed in *Illinois* v. *Somerville*, 410 U.S. 458 (1973). In *Breed* v. *Jones*, 421 U.S. 519 (1975), the Court held the clause protected minors subjected first to a juvenile proceeding and then to a criminal trial as an adult, but *Swisher* v. *Brady*, 438 U.S. 204 (1978), held that the clause was not violated by a state procedure under which masters hear evidence and make preliminary recommendations that may be confirmed, modified, or remanded by a juvenile court judge.

**[P. 1095, add to N. 12:]**

See *Serfass* v. *United States*, 420 U.S. 377, 388 (1975); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977); *Crist* v. *Bretz*, 437 U.S. 28, 35–36 (1978).

**[P. 1095, in text following N. 13, add:]**

Recent case law deals extensively with when a retrial is permitted, with the effect that the rights of defendants have been both expanded and contracted.

***Acquittal.***—"[T]he law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that 'even though innocent he may be found guilty.' "[1.5] Disputes have arisen, however, with respect to whether some actions constitute acquittals, since without a jury verdict or an express acquittal by a trial judge a dismissal of the indictment may reflect some other basis of disposition. In *United States* v. *Martin Linen Supply Co.*,[2.5] after the jury deadlocked and was discharged, the trial judge granted defendant's motion for a judgment of acquittal under the federal rules on the basis that the Government had not proved facts constituting the offense. An appeal by the Government was held barred because the judge's order was in form and substance an acquittal; the resolution of the question rests on a determination "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."[3.5] An acquittal is, of course, final even if the dismissal was entered erroneously.[4.5] But in *United States* v. *Scott*,[5.5] the Court narrowed the definition of acquittal by holding that when, on defendant's motion, the trial judge dismisses the indictment, during the trial and before the jury has rendered a verdict, on grounds that do not relate to factual guilt or innocence, the Government may appeal the dismissal and if necessary retry the defendant.

***Mistrial on Motion of Defendant.***—Ordinarily, when the de-

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[1.5] *United States* v. *Scott*, 437 U.S. 82, 91 (1978).

[2.5] 430 U.S. 564 (1977). In *Burks* v. *United States* 437 U.S. 1 (1978) the Court held that an appellate court reversal of a conviction on the basis of insufficient evidence constituted an acquittal and that defendant could not be retried even if he had requested a new trial. The decision does not disturb the usual rule that a defendant who successfully appeals his conviction on grounds of trial error may be retired. Id., 13–16.

[3.5] *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). In *United States* v. *Jenkins*, 420 U.S. 358, 365 (1975), the Court had assumed that a trial judge's acquittal of a defendant following a jury verdict of conviction could be appealed by the government because if the judge's decision were set aside there would need to be no further proceedings at trial, just a reinstatement of the jury's verdict. In overruling *Jenkins* in *United States* v. *Scott*, 437 U.S. 82 (1978), the Court continued to leave open the possibility of appealing a trial judge's acquittal under these circumstances. Id., 91 n. 7.

[4.5] *Sanabria* v. *United States*, 437 U.S. 54 (1978), held final a judgment of acquittal based on erroneous exclusion of evidence.

[5.5] 437 U.S. 82 (1978). At the close of all evidence, the trial court granted defendant's motion to dismiss on the basis of prejudicial preindictment delay. *United States* v. *Jenkins*, 420 U.S. 358 (1975), had held that, regardless of the character of the midtrial termination, appeal was barred if further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. See *Lee* v. *United States*, 432 U.S. 23 (1977).

fendant moves successfully for a mistrial, the double jeopardy clause imposes no barrier to retrial. "Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." [6.5] Even if defendant's motion is necessitated by prosecutorial or judicial error, unless there is prosecutorial or judicial overreaching, motivated by bad faith or undertaken to harass or prejudice, retrial following granting of defendant's motion is not foreclosed.[7.5]

***Mistrial on Motion of Prosecutor or Sua Sponte by Judge.***—The double jeopardy clause protects a defendant's "valued right to have his trial completed by a particular tribunal." "Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." [8.5] Thus, only when a mistrial is required by "manifest necessity" or "the ends of public justice" will a second trial be permitted if defendant did not move for or consent to the mistrial. The words do not, of course, "describe a standard that can be applied mechanically . . . ." Rather, attention must be paid to the particular problem before the trial court. When the basis for mistrial is some aspect that indicates prosecutorial overreaching, the "strictest scrutiny" is called for; if it reflects some fact such as a deadlocked jury, deference to the judge's discretion is appropriate.[9.5] Other situations also raise the necessity of vesting broad discretion in the trial judge because he is present to observe the effect of an occurrence on the trial. Misconduct by defense counsel, the Court

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[6.5] *United States* v. *Scott*, 437 U.S. 82, 93 (1978).

[7.5] In *United States* v. *Dinitz*, 424 U.S. 600 (1976), the trial judge had excluded defendant's principal attorney for misbehavior; under these circumstances, although the banishment may have been in error, it was not done in bad faith to goad defendant into requesting a mistrial or to prejudice his prospects for acquittal. Defendant's choice, even in situations where all his choices are hard ones, to terminate the trial and go on to a new trial should be respected and a new trial not barred. To hold otherwise would necessitate requiring defendant to proceed to a probable conviction followed by an appeal which if successful would lead to a new trial. See *Lee* v. *United States*, 432 U.S. 23 (1977) (defendant's motion to dismiss because the information was improperly drawn made after opening statement and renewed at close of evidence was functional equivalent of mistrial and when granted did not bar retrial).

[8.5] *Arizona* v. *Washington*, 434 U.S. 497, 503–505 (1978) (footnote citations omitted).

[9.5] Id., 505–509. See *Illinois* v. *Somerville*, 410 U.S. 458, 461–466 (1973).

[10.5] *Arizona* v. *Washington*, 434 U.S. 497 (1978). During his opening argument, defendant's counsel made improper prejudicial remarks and prosecutor moved for mistrial. Admitting that in a strict, literal sense, mistrial was not "necessary" because the trial judge could have given limiting instructions to the has held is one such example.[10.5] Similarly, when because of error not reflecting prosecutorial overreaching, trial would simply be a nullity if it is allowed to continue to a conviction, his decision to terminate it should be respected.[11.5]

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jury, the Court held that the highest degree of respect should be given to the trial judge's evaluation of the likelihood of the impairment of the impartiality of one or more jurors. As long as support for a mistrial order can be found in the trial record, no specific statement of "manifest necessity" need be made by the trial judge.

[11.5] *Illinois* v. *Somerville*, 410 U.S. 458 (1973). After jeopardy attached, it was discovered that the indictment was incurably defective, which would have caused the reversal on appeal of any conviction. Holding that retrial was not barred following the trial court's declaration of a mistrial under these circumstances, the Court said: "A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error could make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court." Id., 464.

### [P. 1097, add to N. 3:]

The Court continues to reject the application of any "waiver" theory in double jeopardy jurisprudence, *United States* v. *Dinitz*, 424 U.S. 600, 609 n. 11 (1976); *United States* v. *Scott*, 437 U.S. 82, 99 (1978), although the concept of "election" by defendant seems suggestive of it. See id., 93; *Jeffers* v. *United States*, 432 U.S. 137, 152-154 (1977) (plurality opinion). Justice Holmes' "continuing jeopardy" theory continues as well to be rejected. *United States* v. Wilson, 420 U.S. 332, 351-353 (1975); *United States* v. *Jenkins*, 420 U.S. 358, 369-370 (1975); *Breed* v. *Jones*, 421 U.S. 519, 533-535 (1975). Chief Justice Burger has suggested that "probably a more satisfactory explanation" why the clause does not preclude the retrial of one who has secured reversal of a conviction on appeal "lies in analysis of the respective interests involved", id., 534, and a determination that on balance the interests of both prosecution and defense are better served.

### [P. 1099, add to N. 10:]

On appeals by the Federal Government in cases permitted by the clause, see *supra, p. 161 n. 1.5.*

### [P. 1099, add to N. 12:]

That *Palko* is no longer viable seems evident from the premises of *Greene* v. *Massey*, 437 U.S. 19 (1978) (if appellate reversal was an acquittal, rather than reversal based on trial error, retrial is barred under *Burks* v. *United States*, 437 U.S. 1 (1978)).

### [P. 1099, add to N. 16:]

The principle is reaffirmed in *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 23-24 (1973).

### [P. 1101, add to N. 5:]

In *Rinaldi* v. *United States*, 434 U.S. 22 (1977), the Court held that a trial court should have dismissed a federal indictment for conduct also being prosecuted in state court; federal prosecution had been begun because of a possibility that the state conviction might be reversed and when it was not the trial court had refused to dismiss because defendant had not asserted the *Petite* policy at trial. The Court held that the defendant was entitled to the benefits of the *Petite* policy whenever the Government seeks to apply it in order to effectuate the clause's purposes of avoiding needless multiple prosecutions.

### [P. 1102, add to N. 7:]

The continuing viability of the dual sovereignty doctrine is evident in *United States* v. *Wheeler*, 435 U.S. 313 (1978), in which the Court sustained the federal indictment of an Indian for statutory rape following his plea of guilty in a tribal court to contributing to the delinquency of a minor, both offenses involving the same conduct. Tribal law stemmed from the retained sovereignty of the tribe and did not flow from the Federal Government; thus, the two prosecutions had been by different sovereigns.

### [P. 1103, add to N. 9:]

In *Whalen* v. *United States*, 445 U.S. 684 (1980), the Court applied the *Blockburger* test to determine that Congress had not intended separate punishments for murder and a lesser included offense of killing in the perpetration of a rape. Viewing *Blockburger* as solely a rule of statutory construction, the Court implied that Congress could without violating the double jeopardy clause authorize separate punishments for the two offenses, and four Justices would have expressly so held. Id., 695, 696, 699. On the use of statutory construction to determine what Congress meant, see *Simpson* v. *United States*, 435 U.S. 6 (1978); *Jeffers* v. *United States*, 432 U.S. 137, 155-158 (1978) (plurality opinion). See also *Iannelli* v. *United States*, 420 U.S. 770 (1975).

### [P. 1104, following N. 14 in text, add:]

In *Brown* v. *Ohio*,[14.1] the Court did apply the same evidence test to bar successive prosecutions for different statutory offenses involving the same conduct in a state court. Defendant had been prosecuted and convicted of joyriding, of operating a motor vehicle without the owner's consent, and was then prosecuted and convicted of stealing the same automobile. Because the state courts had conceded that joyriding was a lesser included offense of auto theft, the Court observed that each offense required the same proof and for double jeopardy purposes met the *Blockburger* test. The second conviction was overturned.[14.2]

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[14.1] 432 U.S. 161 (1977). But compare *Illinois* v. *Vitale*, 447 U.S. 410 (1980). The Court did suggest that a different result might have been reached if the legislature had provided that joyriding is a separate offense for each day in which a motor vehicle is operated without the owner's consent, id., 432 U.S., 169 n. 8, so that the two indictments each specifying a different date on which the offense occurred would have required different evidence.

[14.2] An exception might exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence. Id., 169 n. 7. In *Jeffers* v. *United States*, 432 U.S. 137, 150-154 (1977) (plurality opinion), another exception was argued for; when defendant fails to raise a double jeopardy claim while opposing the prosecution's effort to try two indictments together, he is deemed to have elected to undergo successive trials on lesser included and greater offenses. But see *Sanabria* v. *United States*, 437 U.S. 54, 75-77 (1978).

**[P. 1105, add to N. 18:]**

Justices Brennan and Marshall continue to argue for adoption of the "same transaction" test, but the Court has so far avoided directly passing on the matter. See, e.g., *Brown* v. *Ohio*, 432 U.S. 161, 170 (1977) (concurring opinion). Note id., 166 n. 6. See the cases collected in Justice Brennan's dissent from a denial of *certiorari* in *Thompson* v. *Oklahoma*, 429 U.S. 1053 (1977).

## Self-Incrimination

**[P. 1109, add to N. 14:]**

The "waiver" concept here as in other recent cases has been pronounced "analytically [un]sound", with the Court preferring to reserve the term "waiver" "for the process by which one affirmatively renounces the protection of the privilege." *Garner* v. *United States*, 424 U.S. 648, 654, n. 9 (1976). Thus, the Court has settled upon the concept of "compulsion" as applied to "cases where disclosures are required in the face of a claim of privilege." Ibid. "[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the Government has not 'compelled' him to incriminate himself." Id., 654. Similarly, the Court has enunciated the concept of "voluntariness" to be applied in situations where it is claimed that a particular factor denied the individual a "free choice to admit, to deny, or to refuse to answer." Id., 654 n. 9, 656–665.

**[P. 1109, add to N. 16:]**

And a prison inmate called to testify in a disciplinary hearing may not be compelled in those proceedings to furnish testimonial evidence that might incriminate him in later criminal proceedings. *Baxter* v. *Palmigiano*, 425 U.S. 308, 316 (1976).

**[P. 1110, add to N. 19:]**

*Fisher* v. *United States*, 425 U.S. 391 (1976), however, holds that however incriminating the contents of certain papers, prepared by accountants from the taxpayer's own papers, might be, compelling him to produce the documents by subpoena would not involve testimonial self-incrimination and would not be barred by the privilege. "[T]he Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating." Id., 408 (emphasis by Court). Even if the documents contained the writing of the person being compelled to produce them, that would be insufficient to trigger the privilege, unless the government had compelled him to write in the first place. Id., 410 n. 11. Only if by complying with the subpoena would the person be making a communication that was both "testimonial" and "incriminating," such as by conceding the existence of the papers or indicating that these are the papers sought, would he have a valid claim of privilege and even there one would have to evaluate the facts and circumstances of the particular case to reach a determination. Id., 410. Seizure of business records in the handwriting of the defendant under a search warrant is therefore even further removed from the protection of the privilege. *Andresen* v. *Maryland*, 427 U.S. 463 (1976).

## [P. 1110, add to N. 21:]

*Garrity* and *Gardner* were approved and reaffirmed in *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973), holding unconstitutional state statutes requiring the disqualification for five years of contractors doing business with the State if at any time they refused to waive immunity and answer questions respecting their transactions with the State. The State can require employees or contractors to respond to inquiries, but only if it offers them immunity sufficient to supplant the privilege against self incrimination. See also *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977).

## [P. 1110, add to N. 25:]

*Doyle* v. *Ohio*, 426 U.S. 610 (1976), refused to permit the prosecution to impeach a defendant's trial testimony through use of the fact that upon his arrest and receipt of a *Miranda* warning he remained silent and did not give the police the exculpatory story he told at trial. Postarrest silence is inherently ambiguous and to permit use of the silence would be unfair since the *Miranda* warning told him he could be silent. Notice that the same result had been achieved under the Court's supervisory power over federal trials in *United States* v. *Hale*, 422 U.S. 171 (1975). But *Jenkins* v. *Anderson*, 447 U.S. 231 (1980), permitted the impeachment use of prearrest silence. While reaffirming that *Griffin* denied prosecutorial comment on a defendant's claim of the privilege and *Doyle* barred comment in the context of a *Miranda* warning the Court saw no barrier when defendant voluntarily took the stand and when no official encouragement to silence had occurred. See also *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976) (prison disciplinary hearing may draw adverse inferences from inmate's assertion of privilege so long as this was not the sole basis of decision against him).

## [P. 1112, add to N. 5:]

See also *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978); *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978).

## [P. 1112, add to N. 6:]

Another prosecution discovery effort was approved in *United States* v. *Nobles*, 422 U.S. 233 (1975), in which a defense investigator's notes of interviews with prosecution witnesses were ordered disclosed to the prosecutor for use in cross-examination of the investigator. The Court discerned no compulsion upon defendant to incriminate himself.

## [P. 1118, add to N. 3:]

*Sullivan* was reaffirmed in *Garner* v. *United States*, 424 U.S. 648 (1976), in which the Court held that failure to claim one's privilege on his tax returns, and the giving of incriminating information leading to conviction, was consistent with the Fifth Amendment. One must assert his privilege to alert the Government to the possibility that it is seeking to obtain incriminating material; it is not coercion forbidden by the clause that upon a claim of the privilege the Government could seek an indictment for failure to file since a valid claim of privilege cannot be the basis of a conviction. The taxpayer was not entitled under the clause to a judicial ruling on the validity of his claim and an opportunity to reconsider if the ruling went against him, irrespective of whether a good faith erroneous assertion of the privilege could subject him to prosecution, a question not resolved.

### [P. 1117, add to N. 21:]

Of course, neither the statute nor the self-incrimination clause prevents the prosecution from proceeding against an immunized witness for perjury committed during his testimony nor from using all his testimony, including his truthful testimony, during his prejury trial to prove the commission of perjury. *United States* v. *Apfelbaum*, 445 U.S. 115 (1980). See also *United States* v. *Wong*, 431 U.S. 174 (1977); *United States* v. *Mandujano*, 425 U.S. 564 (1976). But the Fifth Amendment is violated when the prosecution uses or attempts to use a defendant's previously immunized testimony to impeach him at trial. *New Jersey* v. *Portash*, 440 U.S. 451 (1979).

### [P. 1133, add to N. 8:]

For the continuing recognition of the difference between the traditional involuntariness test and the *Miranda* test, see *Michigan* v. *Tucker*, 417 U.S. 433, 443–446 (1974). Waiver of one's rights after the Miranda warning need not be express; rather, it is to be judged by a totality of the circumstances test. *North Carolina* v. *Butler*, 441 U.S. 369 (1979) (refusal of defendant to sign written waiver and absence of explicit oral waiver not necessarily showing of lack of waiver; under proper test, waiver found). See also *Fare* v. *Michael C.*, 442 U.S. 707 (1979) (juvenile's request for his probation officer after warnings rather than for lawyer does not constitute assertion of *Miranda* rights foreclosing interrogation). And see *Tague* v. *Louisiana*, 444 U.S. 469 (1980).

### [P. 1134, add to N. 10:]

But see *Michigan* v. *Mosley*, 423 U.S. 96 (1975) (suspect given *Miranda* warnings at custodial interrogation for a robbery, requested questioning cease, and police complied; some two hours later a different policeman interrogated suspect about a murder, gave him a new *Miranda* warning, and he subsequently made incriminating admission. Result: statement admissible since policy scrupulously honored suspect's request and procedure was not subterfuge); *Oregon* v. *Mathiason*, 429 U.S. 492 (1977) (no *Miranda* warning required because no custodial interrogation when suspect came voluntarily to police station to be questioned, he was not placed under arrest while there, and he was allowed to leave at end of interview, even though defendant was named by victim as suspect, questioning took place behind closed doors, and suspect was falsely informed that his fingerprints had been found at scene of crime); *Beckwith* v. *United States*, 425 U.S. 341 (1976) (IRS agents' interview with taxpayer in private residence, no custodal interrogation, therefore no *Miranda* warning required); *United States* v. *Mandujano*, 425 U.S. 564 (1976) (perjury before grand jury not excusable by failure to give *Miranda* warnings to putative defendant; no Court majority whether *Miranda* warning required at all). Note *Brown* v. *Illinois*, 422 U.S. 590 (1975), in which the Court held that the giving of *Miranda* warnings did not dissipate taint of illegal arrest so as to make incriminating statement admissible.

### [P. 1134, add to N. 12:]

*Harris* was extended in *Oregon* v. *Hass*, 420 U.S. 714 (1975), in which defendant had been given *Miranda* warnings but police had not honored his request for counsel before interrogation continued. Impeachment use of incriminating statements was permitted. See *Doyle* v. *Ohio*, 426 U.S. 610 (1976) (no impeachment use of silence by defendant after receipt of *Miranda* warnings). But in order to be able to use admissions obtained in violation of *Miranda*, the prosecution must show that they were made voluntarily. *Mincey* v. *Arizona*, 437 U.S. 385, 396–402 (1978) (four hours questioning of seriously wounded and barely conscious suspect overbore his will and rendered involuntary his confession).

**[P. 1134, following first full paragraph on page, add:]**

After years in which the Court narrowly construed its *Miranda* decision in a variety of contexts, it has most recently reaffirmed it and given it an expansive interpretation in defining what constitutes interrogation, while in the particular fact situation much more narrowly applying the definition. Nonetheless, the rationale for restricting resort to federal *habeas corpus* on *Miranda* claims continues to remain present but unexercised. Thus, despite acceptance by some of the decision's staunchest critics on the Court,[1.5] *Miranda's* vitality remains somewhat in doubt.

Police, in *Rhode Island* v. *Innis*,[2.5] had apprehended defendant as a murder suspect but had not found the weapon used. While he was being transported to police headquarters in a squad car, defendant was not asked questions by the officers present, he having been given the *Miranda* warnings and asserting he wished to consult a lawyer before submitting to questioning. However, the officers engaged in conversation among themselves in which they indicated a school for handicapped children was near the crime scene and they hoped the weapon was found before a child discovered it and was injured. Defendant then took them to the weapon's hiding place. The prosecution sought to uphold admissibility of the weapon and testimony relating to its discovery by arguing that *Miranda* would have been violated only by express questioning of the defendant.

Unanimously, the Court rejected this contention. "We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police."[3.5]

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[1.5] E.g., *Rhode Island* v. *Innis*, 446 U.S. 291, 304 (1980) (Chief Justice Burger concurring) ("The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures: I would neither overrule *Miranda*, disparage it, nor extend it at this late date.")

[2.5] 446 U.S. 291 (1980). A remarkably similar factual situation was presented in *Brewer* v. *Williams*, 430 U.S. 387 (1977), which, however, the Court decided on Sixth Amendment grounds.

[3.5] *Rhode Island* v. *Innis*, 446 U.S. 291, 300–301 (1980) (footnote citations omitted).

A divided Court then concluded that the officers' conversation did not amount to a functional equivalent of questioning and that the evidence was admissible.

Potential limitation of *Miranda* claims on *habeas* flows from the analysis in *Michigan* v. *Tucker*,[4.5] in which the Court was confronted with the question whether *Miranda* required the exclusion of the testimony of a witness when the witness was discovered because of the statement of defendant in interrogation following an inadequate *Miranda* warning.[5.5] The interrogation had taken place prior to *Miranda* but the trial had followed the Court's decision in that case, leading to the exclusion of defendant's statement but not of the testimony of the witness. The actual holding of the Court and the concurrence of two Justices turned on the fact that the interrogation preceded *Miranda* and that warnings had been given, although not the full *Miranda* warning;[6.5] thus, in some respects, the decision is in the line of retroactivity cases. But of great possible significance was the action of the Court in considering "whether the police conduct complained of directly infringed upon respondent's rights against compulsory self-incrimination or whether it instead violated only the prophylactic rules developed to protect that right."[7.5] Finding that defendant's statement had not been coerced nor otherwise procured in violation of his privilege, the Court found that good-faith, inadvertent error in not fully complying with the "prophylactic" *Miranda* rules did not require exclusion of the testimony, because the error preceded *Miranda*, because exclusion would not deter wrongful conduct, and because admission would not implicate the trial court in the use of possibly untrustworthy evidence.[8.5] Obviously, dividing the question in this way between a constitutional right and a judicially-created enforcement mechanism permits courts a considerable degree of flexibility to apply or not to apply the exclusionary rule previously thought to be fairly rigid under *Miranda*.

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[4.5] 417 U.S. 433 (1974).

[5.5] *Quaere*, whether the witness' testimony was suppressible in any event. In *United States* v. *Ceccolini*, 435 U.S. 268 (1978), the Court held admissible the testimony of a witness discovered through an illegal search by applying a different standard than when the admission of an inanimate object is the issue. To be sure, the case arose under the Fourth Amendment, but the exclusionary rule analysis under both Amendments is usually the same.

[6.5] Justices Rehnquist, Stewart, Blackmun, Powell, and Chief Justice Burger joined the opinion of the Court. Justices Brennan and Marshall concurred on the ground that since *Miranda* had not involved the question of the admissibility of the "fruits" of evidence obtained through *Miranda* violations there was no retroactive application to be made. 417 U.S., 453. Justice Stewart noted he could have joined this opinion as well. Ibid. Justice White continued to think *Miranda* was wrongfully decided but concurred because he did not think "fruits" should be excluded although discovered as a result of a *Miranda* violation, id., 460, and Justice Douglas dissented. Id., 461.

[7.5] Id., 439.

[8.5] Id., 446–452.

In particular, the many similarities between the treatment of the Fifth Amendment exclusionary rule in *Tucker* and other recent cases and the Fourth Amendment exclusionary rule raise the prospect that the former may be treated like the latter for purposes of foreclosing claims on federal *habeas corpus* when state courts have afforded a full and fair opportunity for consideration of such claims.[9.5] Both rules seem to be viewed as prophylactic devices intended to deter police violations rather than as safeguards against inherently unreliable evidence or violations of the integrity of the factfinding process. So far, the Court has not reached the question.[10.5]

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[9.5] *Stone* v. *Powell*, 428 U.S. 465 (1976). Compare *Rose* v. *Mitchell*, 443 U.S. 545 (1977).

[10.5] Application of *Stone* to *Miranda* was reserved in *Wainwright* v. *Sykes*, 433 U.S. 72, 87 n. 11 (1977). See *Brewer* v. *Williams*, 430 U.S. 387, 413–414 (1977) (Justice Powell concurring), and id., 426–429 (Chief Justice Burger dissenting). Note, however, that if *Miranda* claims were made subject to *Stone* v. *Powell*, the traditional voluntariness test of admitting confessions and incriminating statements emphasizes lack of reliability and trustworthiness, which might well make these claims not subject to *Powell*, see *Rose* v. *Mitchell*, 443 U.S. 545 (1977), and make questionable the value in the Court's perspective of limiting *habeas* *Miranda* claims.

**[P. 1136, add to N. 7:]**

On the sufficiency of state court determinations, see *Swenson* v. *Stidham*, 409 U.S. 224 (1972); *La Vallee* v. *Delle Rose*, 410 U.S. 690 (1973).

## Due Process: Procedural

**[P. 1145, add to N. 24:]**

A predeprivation hearing is not now invariably required; a balancing of interests is followed. *Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

**[P. 1147, add to N. 10:]**

But see *Arnett* v. *Kennedy*, 416 U.S. 134, 170 n. 5 (Justice Powell), 196–199 (Justice White) (1974) (hearing before probably partial officer at pretermination stage).

**[P. 1147, add to N. 14:]**

As to evidentiary presumptions in federal civil cases and in administrative hearings, the Court experiences the same difficulties under the Fifth Amendment's due process clause. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 23–24 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749, 767–785 (1975).

**[P. 1156, add to N. 3:]**

"It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States* v. *Mazurie*, 419 U.S. 544, 550 (1974) (that a proscribed bar was not located in a "non-Indian community" was ascertainable upon consideration of its location and the racial composition of its surrounding residents; Government need not present proof of precisely defined concepts of "Indian" and "community"); *United States* v. *Powell*, 423 U.S. 87 (1975) (prohibiting mailing of "firearms capable of being concealed on the person" may well create some problems in marginal fact situations but when considered in context of what defendant did, mailing a 22-inch-long sawed-off shotgun capable of being concealed on the average person, the statute intelligibly forbade a definite course of conduct). See *Parker* v. *Levy*, 417 U.S. 733 (1974), in which the relaxed standards of economic due process were applied to the definitions of crimes in military law even though expression was implicated.

### [P. 1162, add to N. 17:]

For the enunciation of standards governing prosecutorial disclosure of material evidence to the defense, applicable in both federal and state trials, see *United States* v. *Agurs*, 427 U.S. 97 (1976).

## Due Process: Substantive

### [P. 1164, add to N. 14:]

"Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975). "The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment's guarantee of due process as well as by the Equal Protection Clause of the Fourteenth Amendment. . . . [B]ut . . . there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State." *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 100 (1976). Thus, the paramount federal power over immigration and naturalization and the national interests served by a citizenship requirement for federal employees—giving the President a treaty negotiating point, stimulating resident aliens to become citizens, the necessity for undivided loyalty in some positions—served to justify the requirements when imposed by the appropriate authorities. Ibid. See also *Mathews* v. *Diaz*, 426 U.S. 67 (1976); *Fiallo* v. *Bell*, 430 U.S. 787 (1977).

### [P. 1165, in text following N. 29, add:]

Held violative of the equal protection standards of the due process clause were a provision of military law which distinguished between men and women in the availability of dependency allowances for no reason other than administrative convenience,[1.5] a provision of the Social Security Act that did not grant survivors' benefits to widowers on the deceased spouse's earnings as it did grant them to widows, because it discriminated against female wage earners on the basis of "archaic" and "overbroad" generalizations,[2.5] a provision of the Social Security law that invidiously discriminated against illegitimate children,[3.5] and a section of the food stamp law that rendered ineligible

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[1.5] *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

[2.5] *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975). See also *Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Califano* v. *Westcott*, 443 U.S. 76 1979). But see *Mathews* v. *De Castro*, 429 U.S. 181 (1976); *Califano* v. *Jobst*, 434 U.S. 47 (1977).

[3.5] *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974). But see *Fiallo* v. *Bell*, 430 U.S. 787 (1977).

for stamps any household including a member over 18 years of age who has been claimed as a tax dependent by a taxpayer who is not eligible for the stamps.[4.5] On the other hand, a veterans' law which extended certain educational benefits to all veterans who had served "on active duty" and thereby excluded conscientious objectors from eligibility was held to be sustainable, it being rational for Congress to have determined that the disruption caused by military service was qualitatively and quantitatively different from that caused by alternative service and for Congress to have so provided to make military service more attractive.[5.5] And a provision of military law that classified men more adversely than women was deemed rational because it had the effect of compensating for prior discrimination against women,[6.5] while a provision of Social Security law providing dependents' benefits to children upon the death of a parent but exempting all legitimate and many illegitimate children from the necessity of proving dependency was sustained as being reasonably related to the likelihood of dependency even though in some cases the classifications were ill-fitting.[7.5] A statutory provision of $1 per diem subsistence for incarcerated witnesses before trial while witnesses merely required to attend trial are provided $20 for each day's attendance and time coming and going was sustained on the basis that this Government bore the costs of confinement and the sustenance of the incarcerated witnesses.[8.5]

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[4.5] *Dept. of Agriculture* v. *Murry*, 413 U.S. 508 (1973). See also *Dept. of Agriculture* v. *Moreno*, 413 U.S. 528 (1973), holding unconstitutional under the due process clause as an invalid "irrebutable presumption" a food stamp section excluding from participation any household containing an individual unrelated to any other member of the household.

[5.5] *Johnson* v. *Robison*, 415 U.S. 361 (1974).

[6.5] *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975).

[7.5] *Mathews* v. *Lucas*, 427 U.S. 495 (1976).

[8.5] *Hurtado* v. *United States*, 410 U.S. 578 (1973). See also *Marshall* v. *United States*, 414 U.S. 417 (1974) (exclusion of persons convicted of two or more prior felonies from drug rehabilitation program is rationally justified); *United States* v. *MacCollom*, 426 U.S. 317 (1976) (right to transcript on *habeas* by indigent that is more restricted than right of person with money satisfies equal protection).

**[P. 1166 in text following N. 3, add:]**

The imposition upon coal mine operators, and ultimately coal consumers, of the liability of compensating *former* employees who terminated work in the industry before passage of the law for black lung disabilities contracted in the course of their work was sustained by the Court as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor.[1.5] Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations, but it must take account of the realities previously existing, i.e., that the danger may not have

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[1.5] *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14–20 (1976). But see id., 38 (Justice Powell concurring).

been known or appreciated, or that actions might have been taken in reliance upon the current state of the law; therefore, legislation imposing liability on the basis of deterrence or of blameworthiness might not have passed muster.

### [P. 1169, add to N. 21:]

In the context of Congress' plan to save major railroad systems, see *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

### [P. 1169, add to N. 22:]

On the restraint on legislative abolition of common law rights to sue, see *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 87–92 (1978) (whether due process requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy is open question but law under review did provide a reasonably just substitute).

### [P. 1170, in text following N. 6, add:]

The Court's most recent statement of the due process standard by which economic regulation—legislative efforts to structure and accommodate the burdens and benefits of economic life—is tested makes clear the "hands-off" character of judicial review in this area.[1.5] Such legislation is to be "accorded the traditional presumption of constitutionality generally accorded economic regulations" and is to be "upheld absent proof of arbitrariness or irrationality on the part of Congress."[2.5] That the accommodation among interests which the legislative branch has struck "may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational."[3.5] Thus, a statute which limits the liability of private industry for nuclear accidents in order to encourage the development of electric energy passed constitutional muster because it addressed a perceived need in a rational way.[4.5]

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[1.5] *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 83–84 (1978). See also *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 14–20 (1976). Note, however, that the Court has utilized the obligation of contracts clause to heighten review of economic regulations of private parties. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). But compare *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

[2.5] *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 83 (1978).

[3.5] Id., 83–84.

[4.5] Id., 84–87. The Court buttressed its conclusion on the issue of the limitation of liability by pointing out that in the law Congress had obligated itself to "take whatever action is deemed necessary and appropriate to protect the public from the consequences of" a nuclear disaster. Id., 86. Whether the Court meant that in the absence of this pledge, the limitation would have been of questionable constitutionality or at least would have presented a closer question cannot be gleaned from the opinion.

## NATIONAL EMINENT DOMAIN POWER

### Just Compensation

**[P. 1184, following N. 9, in text, add:]**

Illustrative of the difficulties in applying the fair market standard of just compensation are two cases in which the Court on five-to-four votes awarded compensation in one and denied it in the other.[1.5] Held entitled to compensation for the value of improvements on leased property for the life of the improvements and not simply for the remainder of the term of the lease was a company that, while its lease had no renewal option, had occupied the land since 1919 and that had every expectancy of continued occupancy under a new lease. Just compensation, the Court said, required taking into account the possibility that the lease would be renewed, inasmuch as a willing buyer and a willing seller would certainly have placed a value on the possibility.[2.5] However, when the Federal Government condemned privately owned grazing land of a rancher who had leased adjacent federally-owned grazing land, it was held that the compensation owed need not include the value attributable to the proximity to the federal land, although if the adjacent land had been privately owned a fair market value standard would have required consideration of the potential use of the private land with the neighboring land, inasmuch as it is the general rule that government need not pay for taking value it itself creates.[3.5]

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[1.5] *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973); *United States v. Fuller*, 409 U.S. 488 (1973). For compensation in both cases were Justices Powell, Douglas, Brennan, and Marshall; opposing compensation in both cases were Justices Rehnquist, White, and Blackmun, and Chief Justice Burger. Justice Stewart made the majority in both cases.

[2.5] *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973). The dissent argued that since upon expiration of the lease only salvage value of the improvements could be claimed by the lessee, just compensation should be limited to that salvage value. Id., 480.

[3.5] *United States v. Fuller*, 409 U.S. 488 (1973). The dissent argued that the principle denying compensation for governmentally-created value should apply only when the Government was in fact acting in the use of its own property; here the Government was acting only as a condemnor. Id., 494.

### When Property Is Taken

**[P. 1190, following N. 18 in text, add:]**

In *Penn Central Transp. Co. v. City of New York*,[1.5] the Court left considerably confused the applicable standards by which it may be determined whether a police power regulation that substantially restricts the profitable use of private property is a taking. The City has a landmarks preservation law under which properties and areas are des-

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[1.5] 438 U.S. 104 (1978). Justice Rehnquist, with Chief Justice Burger and Justice Stevens, dissented. Id., 138.

ignated as landmarks; following designation, the owner must maintain the property or area and must obtain special permission in order to alter the exterior architectural features or to construct any exterior improvement. Penn Central, owning Grand Central Terminal which had been properly designated, sought approval to construct a 53-story office building atop the terminal, necessitating some considerable changes in the building, and from which the Company reasonably anticipated a net of $3 million annually in rents; approval was denied. The Company then attacked the constitutionality of the landmarks law, contending that its property had in effect been "taken" because it could not enjoy the fulfillment of its expectations with respect to it.

Acknowledging that it, "quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons", the Court went on to specify that "essentially ad hoc, factual inquiries" were necessary.[2.5] The landmarks law was sustained upon a consideration of a set of balancing factors. First, courts must look to the economic impact of the regulation on the owner and particularly to the extent to which the regulation interferes with distinct investment-backed expectations. Here, the Company retained much money-producing ability in the Terminal and its rental of available spaces; moreover, the City specifically permitted owners of landmark sites to transfer to other sites the right to develop those sites beyond the otherwise permissible zoning restrictions, a valuable right which mitigated the burden otherwise to be suffered by the owner. And, too, the landmarks designation did not alter the primary expectancy of the Company to use the site for what it had always been used, as a rail terminal. Second, the character of the governmental regulation must be examined. When there is a physical invasion by the government, a taking may more easily be found than when there is a public program adjusting the benefits and burdens of economic life to promote the common good. The landmarks law was of the latter type, the preservation of historic sites being a permissible goal and one which served the public interest.[3.5]

In the course of its opinion the Court rejected three tests which have at varying times been used to judge the facial validity of land-use regulations. First, it has been argued that government may ban the use of property for purposes that would be noxious, of hazard to health or safety, without compensating, but that compensation must be awarded whenever for a public purpose government regulates a use which has no harmful effect on the public or surrounding property owners.[4.5] The Court denied that there was any such test and that prior cases had turned on the concept. "These cases are better understood as

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[2.5] Id., 124.

[3.5] Id., 124-128, 135-138.

resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public health and applicable to all similarly situated property.”[5.5] Second, it has been suggested that the test of taking turn on whether the regulations resolve conflicts between individuals, in which case no compensation is owed, or whether they further governmental interests at the expense of individuals, in which case compensation is required. This test the Court made irrelevant to this kind of regulation by observing that the landmarks law “neither exploits appellants' parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city.”[6.5] Third, it has been argued that in order not to be a taking a regulation of property use must spread its distribution of benefits and burdens broadly so that each person burdened has at the same time the enjoyment of the benefit of the restraint upon his neighbors. But the Court deemed it immaterial that the landmarks law has a more severe impact on some landowners than on others; “Legislation designed to promote the general welfare commonly burdens some more than others.”[7.5]

Thus, the decision leaves in considerable doubt whether there is an applicable test.[8.5] The Court's concluding sentence merely states the conclusory nature of its decision. “The restrictions imposed are substantially related to the promotion of the general welfare and not only afford reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.”[9.5]

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[4.5] The dissent used this test. Id., 144–146.

[5.5] Id., 133–134 n. 30.

[6.5] Id., 135.

[7.5] Id., 133–134. The dissent would have applied this test in case of regulation of non-noxious uses. Id., 147–150.

[8.5] The Court did reject the limiting “proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel.” Id., 123 n. 25.

[9.5] Id., 138. Neither is analysis furthered by *Andrus v. Allard*, 444 U.S. 51 (1979). See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), finding a taking in the context of assertion of public rights over navigable waters made navigable by the improvements of the private landowner.

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# AMENDMENT 6—RIGHTS OF ACCUSED

## Criminal Prosecutions

### [P. 1196, add to N. 5:]

Declining to decide whether there is a right to counsel in a court-martial, the Court ruled that the summary court-martial involved in the case was not a "criminal prosecution" within the meaning of the Amendment. *Middendorf* v. *Henry*, 425 U.S. 25, 33–42 (1976).

## Speedy Trial

### [P. 1198 add to N. 7:]

In *United States* v. *Lovasco*, 431 U.S. 783 (1977), the Court reasserted the principle of *Marion* that in some circumstances preaccusation delay would constitute a due process violation but not a speedy trial clause violation; if prejudice results to a defendant because of the government's delay, a court should balance the degree of prejudice to the defendant against the reasons for delay given by the prosecution.

### [P. 1199, add to N. 16:]

A trial court denial of a motion to dismiss an indictment on speedy trial clause violations grounds is not an appealable order under the "collateral order" exception to the finality rule. One must raise the issue on appeal from a conviction if he is convicted. *United States* v. *MacDonald*, 435 U.S. 850 (1977).

### [P. 1199, add to N. 17:]

Dismissal, the Court has held, is the only possible remedy for a violation of the right to a speedy trial. *Strunk* v. *United States*, 412 U.S. 434 (1973). Congress has now established rules for the federal courts which impose strict time deadlines, instead of the *Barker* factors. Speedy Trial Act, P.L. 93-619, 88 Stat. 2076, 18 U.S.C. 3152–3156, 3161 *et seq.*; 28 U.S.C. 604.

## Public Trial

### [P. 1200, following N. 6 in text, add:]

In *Gannett Co.* v. *De Pasquale*,[1.6] the Court held that a trial judge may bar access to pretrial proceedings by the public and the press upon the concurrence of defendant and prosecution. What occasioned great controversy was the line of argument of the opinion of the Court that interpreted the Sixth Amendment right to a public trial to be a per-

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[1.6] 443 U.S. 368 (1979).

sonal right of the defendant alone and not to confer any right of access to the public or the press.[illegible] Although it was evident that not all the Justices in the bare majority adhered to this analysis,[illegible] confusion resulted until in the *Richmond Newspapers* case a nearly unanimous Court held that the *First Amendment*, viewed against the tradition of public access to trials, guaranteed the public's and the press' right to attend criminal trials, a right deniable only on the basis of the trial judge's determination of an overriding interest articulated in the record.[illegible]

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[illegible] Id., 379-387. The four-Justice dissent controverted this Sixth Amendment analysis at Id., 411-433.

[illegible] Chief Justice Burger's concurrence emphasizes that the case dealt only with a pretrial proceeding. Id., 394, while Justice Powell's concurrence answered affirmatively the question the opinion of the Court reserved, whether the First Amendment guaranteed a right of access to pretrial proceedings. Id., 397.

[illegible] *Richmond Newspapers* v. *Virginia*, 448 U.S. 555 (1980).

## Trial by Impartial Jury

### [P. 1203, add to N. 14:]

Preserving *Callan*, as being based on Article III, § 2, as well as on the Sixth Amendment and being based on a more burdensome procedure, the Court in *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976), approved a state two-tier system under which persons accused of certain crimes must be tried in the first instance in the lower tier without a jury and if convicted may appeal to the second tier for a trial *de novo* by jury. Applying a due process standard, the Court, in an opinion by Justice Blackmun, found that neither the imposition of additional financial costs upon a defendant, nor the imposition of increased psychological and physical hardships of two trials, nor the potential of a harsher sentence on the second trial impermissibly burdened the right to a jury trial. Justices Stevens, Brennan, Stewart, and Marshall dissented. Id., 632. See also *North* v. *Russell*, 427 U.S. 328 (1976).

### [P. 1203, add to N. 19:]

In *Ballew* v. *Georgia*, 435 U.S. 223 (1978), the Court unanimously, but with varying expressions of opinion, held that conviction by a unanimous five-person jury in a trial for a nonpetty offense deprived an accused of his right to trial by jury. While readily admitting that the line between six and five members is not easy to justify, the Justices believed that reducing a jury to five persons in nonpetty cases raised substantial doubts as to the fairness of the proceeding and proper functioning of the jury to warrant drawing the line at six.

### [P. 1204, add to N. 20:]

*Burch* v. *Louisiana*, 441 U.S. 130 (1979), however, held that conviction by a nonunanimous six-person jury in a state criminal trial for a nonpetty offense, under a provision permitting conviction by five out of six jurors, violated the right of the accused to trial by jury. Acknowledging that the issue was "close" and that no bright line illuminated the boundary between permissible and impermissible, the Court thought the near-uniform practice throughout the Nation

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of requiring unanimity in six-member juries required nullification of the state policy. See also *Brown* v. *Louisiana*, 447 U.S. 323 (1980) (*Burch* held retroactive).

### [P. 1206, add to N. 2:]

In *Castaneda* v. *Partida*, 430 U.S. 482 (1977), the Court held that a Mexican-American defendant had successfully made out a prima facie case of intentional exclusion of persons of his ethnic background by showing a substantial underrepresentation of Mexican-Americans based on a comparison of the group's proportion in the total population of eligible jurors to the proportion called to serve.

### [P. 1206, add to N. 5:]

"[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment." *Taylor* v. *Louisiana*, 419 U.S. 522, 528 (1975). "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren* v. *Missouri*, 439 U.S. 357, 364 (1979). Thus, *Taylor* voided a selection system under which no woman would be called for jury duty unless she had previously filed a written declaration of her desire to be subject to service and *Duren* voided a state selection system granting women who so request an automatic exemption from jury service. In both cases, male defendants were permitted to challenge the exclusion of women.

### [P. 1207, add to N. 8:]

This holding was given added force when in *Woodson* v. *North Carolina*, 428 U.S. 280 (1976), and *Roberts* v. *Louisiana*, 428 U.S. 325 (1976), the Court held that a legislature's provision for mandatory death sentences upon conviction of certain crimes was unconstitutional and that the jury as a representative of community mores must make the determination as guided by legislative standards. See also *Adams* v. *Texas*, 448 U.S. 38 (1980) (holding *Witherspoon* applicable to bifurcated capital sentencing procedures and voiding a statute permitting exclusion of any juror unable to swear that the existence of the death penalty would not affect his deliberations on any issue of fact).

### [P. 1207, add to N. 11:]

Exposure of the jurors to knowledge about defendant's prior criminal record and activities is not alone sufficient to presume reversible prejudice, especially in the absence of the pervasive publicity and courtroom disorder that existed in *Irvin* v. *Dowd* and *Sheppard* and other cases and in the presence of *voir dire* inquiry directed to eliciting from jurors their knowledge and their ability to judge impartially. *Murphy* v. *Florida*, 421 U.S. 794 (1975). Under the same circumstances in a federal trial, the Court indicated, it would under its supervisory power overturn a conviction. Id., 797–798, citing *Marshall* v. *United States*, 360 U.S. 310 (1959).

**[P. 1206 in text following N. 16, add:]**

Under some circumstances, it may be constitutionally required that on *voir dire* questioning of prospective jurors, in addition to customary questions directed to general bias or prejudice, questions specifically directed to racial prejudice must be asked. Thus, in a situation in which defendant, a black man, alleged that he was being prosecuted on false charges because of his civil rights activities in an atmosphere perhaps open to racial appeals, prospective jurors must be asked about their racial prejudices if any.[1.5] But in circumstances not suggesting a significant likelihood of racial prejudice infecting a trial, as merely when the defendant is a Negro and the victim white, the Constitution is satisfied by a more generalized but thorough inquiry into the impartiality of the veniremen.[2.5]

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[1.5] *Ham* v. *South Carolina*, 409 U.S. 524 (1973).

[2.5] *Ristaino* v. *Ross*, 424 U.S. 589 (1976). Justices Marshall and Brennan dissented. *Id.*, 599. The Court noted that under its supervisory power over the federal courts it would require a federal trial court faced with the same circumstances to propound appropriate questions to identify racial prejudice if requested by the defendant. Id., 597 n. 9. See *Aldridge* v. *United States*, 283 U.S. 308 (1931).

## Confrontation

**[P. 1212, add to N. 13:]**

In *Davis* v. *Alaska*, 415 U.S. 308 (1974), the Court held that a state law prohibiting disclosure of the identity of juvenile offenders could not be applied to preclude cross-examination of a witness about his juvenile record when the object of the cross-examination was to allege possible bias on the part of the witness affecting his testimony about defendant. See also *Chambers* v. *Mississippi*, 410 U.S. 284 (1973). And see *United States* v. *Nobles*, 422 U.S. 225, 240–241 (1975).

**[P. 1212, add to N. 14:]**

In *Parker* v. *Randolph*, 442 U.S. 62 (1979), the Court was evenly divided on the question whether interlocking confessions may be admitted without violating the confrontation clause. Four Justices held that admission of such confessions is proper, even though neither defendant testifies, if the judge gives the jury a limiting instruction. Four Justices held that a harmless error analysis should be applied, although they then divided over its meaning in this case.

**[P. 1214, add to N. 17:]**

*Ohio* v. *Roberts*, 448 U.S. 56 (1980), held that the opportunity to cross-examine a witness at a preliminary hearing satisfied the confrontation clause, in the instance of her unavailability at trial. But the fact situation involved a preliminary hearing in which defendant's counsel called the witness and attempted to elicit exculpatory testimony on cross-examination. The situation was thus in the Court's view as effective a confrontation as cross-examination at trial.

## Assistance of Counsel

### [P. 1220, add to N. 24:]

*Scott* v. *Illinois*, 440 U.S. 367 (1979), modified *Argersinger* in holding that actual imprisonment marked the line between provision of counsel and no provision, that the possibility of imprisonment is insufficient. Thus, if counsel is not provided, defendant may not be sentenced to imprisonment. Justice Powell provided the crucial vote for the rule because he adhered to his prior view that *Argersinger* was not required by the Constitution, that a more flexible rule was proper. But see *Baldasar* v. *Illinois*, 446 U.S. 222 (1980).

### [P. 1220, add to N. 2:]

Although under *Scott* v. *Illinois*, 440 U.S. 367 (1979), an uncounseled misdemeanor conviction is valid if the offender is not incarcerated, such a conviction may not be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term. *Baldasar* v. *Illinois*, 446 U.S. 222 (1980).

### [P. 1221, in text following N. 3, add:]

Moreover, the Sixth Amendment guarantees a defendant the right to do without counsel and to conduct his own defense.[1.5] He must waive counsel knowingly and intelligently and must be informed of the consequences of doing so but if he desires the Constitution assures him the right even if it is to his detriment in the way he manages his case.

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[1.5] *Faretta* v. *California*, 422 U.S. 806 (1975). Chief Justice Burger and Justices Blackmun and Rehnquist dissented. Id., 836.

### [P. 1221, add to N. 5:]

In *Geders* v. *United States*, 425 U.S. 80 (1976), the Court held that a trial judge's order preventing defendant from consulting his counsel during a 17-hour overnight recess in the trial between his direct and cross-examination in order to prevent tailoring of testimony or "coaching" deprived defendant of his right to assistance of counsel and was invalid.

### [P. 1221, in text following N. 6, add:]

Thus, "the right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments."[2.5] So saying, the Court invalidated a statute empowering every judge in a nonjury criminal trial to deny the parties the right to make a final summation before rendition of judgment which had been applied in the specific case to prevent defendant's counsel from making a summation. The opportunity to

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[2.5] *Herring* v. *New York*, 422 U.S. 853, 857 (1975).

participate fully and fairly in the adversary factfinding process includes counsel's right to make a closing argument.

Whenever defense counsel is representing two or more defendants and asserts in timely fashion to the trial judge that because of possible conflicts of interest between or among his clients he is unable to render effective assistance, the judge must examine the claim carefully and unless he finds the risk too remote he must permit or appoint separate counsel.[3.5] Subsequently, the Court elaborated upon this opinion and extended it.[4.5] First, the Sixth Amendment right to counsel grants such protection to defendants who retain private counsel as well as to defendants served by appointed counsel. Second, judges are not automatically required to initiate an inquiry into the propriety of multiple representation, being able to assume in the absence of undefined "special circumstances" that no conflict exists. Third, to establish a violation, a defendant must show an "actual conflict of interest which adversely affected his lawyer's performance." Once it is established that a conflict affected the lawyer's action, however, prejudice need not be proved.[5.5]

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[3.5] *Holloway* v. *Arkansas*, 435 U.S. 475 (1978). Counsel had been appointed by the court.

[4.5] *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980).

[5.5] Id., 348-350.

[P. 1223, in text at end of full paragraph, add:]

*Massiah* has been reaffirmed and in some respects expanded by the Court. Thus, in *Brewer* v. *Williams*,[6.5] the right of counsel was found violated when police elicited from defendant incriminating admissions not through formal questioning but rather through a series of conversational openings designed to play on defendant's known weakness in order to obtain the admissions. The police conduct occurred in the post-arraignment period in the absence of defense counsel and despite assurances to the attorney that defendant would not be questioned in his absence. *United States* v. *Henry* [7.5] held that government agents violated the Sixth Amendment right to counsel when they contacted the cellmate of an indicted defendant and promised him payment under a contingent fee arrangement if he would "pay attention" to incriminating remarks initiated by the defendant and others. The Court concluded that even if the government agents did not intend the informant to take affirmative steps to elicit incriminating statements from the defendant in the absence of counsel, the agents must have known that result would follow.

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[6.5] 430 U.S. 387 (1977). Chief Justice Burger and Justices White, Blackmun, and Rehnquist dissented, Id., 415, 429, 438. Compare, *Rhode Island* v. *Innis*, 446 U.S. 291 (1980), decided on self-incrimination grounds under similar facts.

[7.5] 447 U.S. 264 (1980) Justices Blackmun, White, and Rehnquist dissented. Id., 277, 289. But compare *Weatherford* v. *Bursey*, 429 U.S. 545 (1977).

**[P. 1225, in text following N. 17, add:]**

In *United States* v. *Ash*,[2.4] the Court redefined and modified its "critical stage" analysis by which it determines when the assistance of counsel is required for an indicted defendant prior to trial. According to the Court, the "core purpose" of the guarantee of counsel is to assure assistance at trial "when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." But assistance would be less than meaningful in the light of developments in criminal investigation and procedure if it were limited to the formal trial itself; therefore, counsel is compelled at "pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both."[2.5] Therefore, unless at the pretrial stage there was involved the physical presence of the accused at a trial-like confrontation at which the accused requires the guiding hand of counsel, the Sixth Amendment does not guarantee the assistance of counsel.

Since the defendant was not present when witnesses to the crime viewed photographs of possible guilty parties, since therefore there was no trial-like confrontation, and since the possibilities of abuse in a photographic display are discoverable and reconstructable at trial by an examination of witnesses, an indicted defendant is not entitled to have his counsel present at such a display.[2.6]

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[2.4] 413 U.S. 300 (1973). Justices Brennan, Douglas, and Marshall dissented. Id., 326.

[2.5] Id., 309–310, 312–313. Justice Stewart, concurring on other grounds, rejected this analysis, id., 321, as did the three dissenters. Id., 326, 338–344. "The fundamental premise underlying *all* of this Court's decisions holding the right to counsel applicable at 'critical' pretrial proceedings, is that a 'stage' of the prosecution must be deemed 'critical' for the purposes of the Sixth Amendment if it is one at which the presence of counsel is necessary 'to protect the fairness *of the trial itself*.'" Id., 339 (Justice Brennan dissenting).

[2.6] Id., 317–321. On the due process standards of identification procedure, see *infra*, S233.

**[P. 1226, add to N. 1:]**

Counsel is not a guaranteed right in prison disciplinary proceedings. *Wolff* v. *McDonnell*, 418 U.S. 539, 560–570 (1974); *Baxter* v. *Palmigiano*, 425 U.S. 308, 314–315 (1976).

## AMENDMENT 7—CIVIL JURY

**[P. 1232, following N. 10, in text, add:]**

In *Colgrove* v. *Battin*,[1.5] the Court by a five-to-four vote held that rules adopted in a federal district court authorizing civil juries composed of six persons were permissible under the Seventh Amendment and congressional enactments. By the reference in the Amendment to the "common law," the Court thought, "the Framers of the Seventh Amendment were concerned with preserving the *right* of trial by jury in civil cases where it existed at common law, rather than the various incidents of trial by jury."[2.5]

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[1.5] 413 U.S. 149 (1973). Justices Marshall and Stewart dissented on constitutional and statutory grounds, id., 166, while Justices Douglas and Powell relied only on statutory grounds without reaching the constitutional issue. Id., 165, 188.

[2.5] Id., 155–156. The Court did not consider what number less than six, if any, would fail to satisfy the Amendment's requirements. "What is required for a 'jury' is a number large enough to facilitate group deliberation combined with a likelihood of obtaining a representative cross section of the community. . . . It is undoubtedly true that at some point the number becomes too small to accomplish these goals, . . ." Id., 160 n. 16.

**[P. 1233, add to N. 16:]**

See also *Melancon* v. *McKeithen*, 345 F. Supp. 105 (D.C.E.D.La.), *aff'd per curiam*, 409 U.S. 943 (1972); *Alexander* v. *Virginia*, 413 U.S. 836 (1973).

**[P. 1234, following N. 2 in text, add:]**

Illustrative of the Court's course of decision on this subject are two unanimous decisions holding that civil juries were required in a suit by a landlord to recover possession of real property from a tenant allegedly behind on rent and in a suit for damages for alleged racial discrimination in the rental of housing in violation of federal law. In the former case, the Court reasoned that its Seventh Amendment precedents "require[ed] trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty."[3.5] The statutory cause of action, the Court found, had several counterparts in the common law, all of which involved a right to trial by jury. In the latter case, the plaintiff had argued that the Amendment was inaplicable to new causes of action created by congressional action, but the Court disagreed. "The Seventh Amendment does apply to actions enforcing statutory rights, and re-

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[3.5] *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974).

quires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."[6.5]

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[6.5] *Curtis* v. *Loether*, 415 U.S. 189, 194 (1974). "A damage action under the statute sounds basically in tort—the statute merely defines a new legal duty and authorizes the court to compensate a plaintiff for the injury caused by the defendants' wrongful breach. . . . [T]his cause of action is analogous to a number of tort actions recognized at common law." Id., 195.

**[P. 1234, in text following N. 4, add:]**

And when Congress committed to administrative determination the finding of a violation of the Occupational Safety and Health Act with a discretion to fix a fine for a violation, the charged party being able to obtain judicial review of the administrative proceeding in a federal court of appeal and the fine being collectible in a suit in federal court, the argument that the absence of a jury trial in the process for a charged party violated the Seventh Amendment was unanimously rejected. "At least in cases in which 'public rights' are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible."[1.5]

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[1.5] *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 450 (1977).

## AMENDMENT 8—PUNISHMENT FOR CRIME

### Cruel and Unusual Punishments

**[P. 1254, at end of paragraph containing N. 21, add:]**

Enactment of death penalty statutes by 35 States and by Congress following the *Furman* decision and renewed litigation with respect to the constitutional validity of capital punishment have not resulted in the elucidation that the judicial process is expected to lead to.[21.4] Instead, while the Court seems firmly on the path to the conclusion that only criminal acts that result in the deliberate taking of human life may be punished by the state's taking of human life,[21.5] it has chosen several different paths in attempting to delineate the acceptable procedural devices that must be instituted in order that death may be constitutionally pronounced and carried out. To summarize, the Court has found that the penalty of death for deliberate murder is not *per se* cruel and unusual, but that mandatory death statutes leaving the jury or trial judge no discretion to consider the indivdual defendant and his crime are cruel and unusual, and that standards and procedures may be established for the imposition of death that would remove or mitigate the arbitrariness and irrationality found so significant in *Furman*.[21.6] The Court is profoundly divided and it is only by

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[21.4] Justice Frankfurter once wrote of the development of the law through "the process of litigating elucidation." *International Assn. of Machinists* v. *Gonzales*, 356 U.S. 617, 619 (1958). The Justices are firm in declaring that the series of death penalty cases failed to conform to this concept. See e.g., Chief Justice Burger, *Lockett* v. *Ohio*, 438 U.S. 586, 602 (1978) (plurality opinion) ("The signals from this Court have not . . . always been easy to decipher."); Justice White, id., 622 (concurring in result) ("The Court has now completed its about-face since *Furman*. . . ."); and Justice Rehnquist, id., 629 (dissenting) ("the Court has gone from piller to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed."), and id., 632 ("I am frank to say that I am uncertain whether today's opinion represents the seminal case in the exposition by this Court of the Eighth and Fourteenth Amendments as they apply to capital punishment, or whether instead it represents the third false start in this direction within the past six years.").

[21.5] On crimes not involving the deliberate taking of human life, see *Coker* v. *Georgia*, 433 U.S. 584, (1977) (rape): *Lockett* v. *Ohio*, 438 U.S. 586, 613 (1978) (Justice Blackmun concurring), and id., 621 (Justice White concurring) (felony murder).

[21.6] Justices Brennan and Marshall adhere to the view that the death penalty is, under all circumstances, a cruel and unusual punishment prohibited by the Eighth Amendment. E.g., *Coker* v. *Georgia*, 433 U.S. 584, 600 (1977); *Lockett* v. *Ohio*, 438 U.S. 586, 619 (1978). See also *Gardner* v. *Florida*, 430 U.S. 349, 364, 365 (1977); *Alford* v. *Florida*, 436 U.S. 935 (1978) (dissenting from denial of certiorari.)

combining the points of agreements among the varying groupings of Justices that it is possible to ascertain the form which permissible statutory schemes may take.

*Furman* held the capital punishment statute before the Court unconstitutional by a 5-to-4 vote with nine opinions accompanying the result. Inasmuch as only two Justices thought the death penalty to be *per se* invalid in all circumstances, those who wished to reinstate the penalty concentrated upon drafting statutes that would limit and structure the discretion exercised by the sentencing authority that was found wanting by the other three Justices in the majority.[4.5] The result was the enactment of statutes that, generally, specified aggravating and mitigating factors that the sentencing authority should consider in imposing sentence and that provided for special procedures to follow in capital cases. In five cases in 1976, the Court approved this approach and refined its analysis of the necessary procedures.[5.5]

First, the Court concluded that the death penalty as a punishment for murder did not itself constitute cruel and unusual punishment. While there are differences of degree among the seven Justices in the majority on this point, they do all seem to concur in the position that reenactment of capital punishment statutes by 35 States and by Congress precludes the Court from concluding that this form of penalty is no longer acceptable to a majority of the American people; rather, it is concluded, a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction. Neither is it possible, the Court continued, for it to decide that the death penalty does not comport with the basic concept of human dignity at the core of the Eighth Amendment. Courts are not free to substitute their own judgments for the people and their elected representatives. A death penalty statute, just as do all other statutes, comes before the courts bearing a presumption of validity which can only be overcome upon a strong showing by those who attack its constitutionality. Whether in fact the death penalty validly serves the permissible functions of retribution and deterrence, the judgments of the state legislatures are that it does and those judgments are entitled to deference. Therefore, the infliction of death as a punishment for murder is not without justification and is not unconstitutionally severe. Neither is the punishment of death disproportionate to the crime being punished, murder.[6.5]

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[4.5] Thus, Justice Douglas thought the penalty had been applied discriminatorily, *Furman* v. *Georgia*, 408 U.S. 238, 245 (1972), Justice Stewart thought it had been applied in an arbitrary, "wanton," and "freakish" manner Id., 310, and Justice White thought it had been applied so infrequently that it served no justifying end. Id. 313.

[5.5] The principal opinion was in *Gregg* v. *Georgia*, 428 U.S. 153 (1976). Statutes of two other States were similarly sustained, *Proffitt* v. *Florida*, 428 U.S. 242 (1976), and *Jurek* v. *Texas*, 428 U.S. 262 (1976), while those of two other States were invalidated. *Woodson* v. *North Carolina*, 428 U.S. 280 (1976); *Roberts* v. *Louisiana*, 428 U.S. 325 (1976).

[6.5] *Gregg* v. *Georgia*, 428 U.S. 153, 168–187 (1976) (Justices Stewart, Powell, and Stevens); *Roberts* v. *Louisiana*, 428 U.S. 325, 350–356 (1976) (Justices White, Second, a different majority, however, concluded that a statute making mandatory the imposition of death for certain crimes involving the taking of human life was violative of the Eight Amendment. In order to make its determination, the plurality looked to history and traditional usage, to legislative enactment, and to jury determinations. Because death is a unique punishment, the sentencing process must provide an opportunity for individual consideration of the character and record of each convicted defendant and his crime along with mitigating and aggravating circumstances.[7.5]

Third, while the imposition of death is constitutional *per se*, the procedure by which sentence is passed must be so structured as to reduce arbitrariness and capriciousness as much as possible.[8.5] What emerges from the prevailing plurality opinion in these cases are requirements (1) that the sentencing authority, jury or judge,[9.5] be given

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Blackmun, Rehnquist, and Chief Justice Burger). The views summarized in the text are those in the Stewart opinion in *Gregg*. Justice White's opinion basically agrees with this opinion in concluding that contemporary community sentiment accepts capital punishment; it was not clear in this opinion (although he did in later opinions) that he accepted the proportionality analysis, but see id., 226, and the separate dissent of Justice Rehnquist in *Woodson v. North Carolina*, 428 U.S. 280, 308 (1976), and his dissent and those of Chief Justice Burger and Justice Blackmun in *Furman* show a rejection of proportionality analysis. Justices Brennan and Marshall dissented, reiterating their *Furman* views. *Gregg*, *supra*, 227, 231.

[7.5] *Woodson* v. *North Carolina*, 428 U.S. 280 (1976); *Roberts* v. *Louisiana*, 428 U.S. 325 (1976). Justices Stewart, Powell, and Stevens composed the plurality utilizing the analysis stated in the text, id., 288–303, with Justices Brennan and Marshall concurring on the basis of their own views of the death penalty. Id., 305, 307, 336. The dissents basically argued that adoption of mandatory sentencing structures demonstrated that they did comport with civilized standards and thus did not violate the cruel and unusual punishments clause. *Woodson*, *supra*, 306 (Justice Rehnquist); *Roberts*, *supra*, 337 (Justice White). In *Roberts* v. *Louisiana*, 431 U.S. 633 (1977), the Court, again 5-to-4, held unconstitutional a provision of law making mandatory the imposition of death upon conviction of first-degree murder of a police officer engaged in the performance of his lawful duties. The Court has specifically reserved the question of mandatory death for a prisoner—or escapee—under a life sentence who murders. *Roberts*, *supra*, 428 U.S., 334 n. 9; *Roberts*, *supra*, 431 U.S., 637 n. 5; *Lockett* v. *Ohio*, 438 U.S. 586, 604 n. 11 (1978).

[8.5] Here adopted is the constitutional analysis of the Stewart plurality of three. "[T]he holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds," *Gregg* v. *Georgia*, 428 U.S. 153, 169 n. 15 (1976), a comment directed to the *Furman* opinions but equally applicable to these cases and to *Lockett*. See *Marks* v. *United States*, 430 U.S. 188, 192–194 (1977). Thus, two Justices would reject capital punishment outright; four Justices would find the practice valid, at least where intentional homicide is the crime and perhaps insofar as the legislature provides adequate standards to avoid arbitrariness. Therefore, whether a sentencing structure meets Court approval depends upon that structure's conformance to the Stewart plurarity's concept.

[9.5] The Stewart plurality noted its belief that jury sentencing in capital cases performs an important societal function in maintaining a link between contemporary community values and the penal system. *Gregg* v. *Georgia*, 428 U.S. 153, 190, but agreed that sentencing may constitutionally be vested in the trial judge.

standards to govern its exercise of discretion and the opportunity to evaluate both the circumstances of the offense and the character and propensities of the accused;[10.5] (2) that to prevent jury prejudice on the issue of guilt there be a separate proceeding after conviction at which evidence relevant to the sentence, mitigating and aggravating, will be presented rather than a unitary proceeding at which everything is presented together;[11.5] (3) that special forms of appellate review be provided not only of the conviction but of the sentence to ascertain that it was in fact fairly imposed both in the facts of the individual case and by comparison with the penalties imposed in similar cases.[12.5]

One of the principal points of *Furman* and of the *Gregg* series of cases, perhaps the overarching principle, was that the jury not be "without guidance or direction" in deciding whether a convicted defendant should live or die. The jury's attention was statutorily "directed to the specific circumstances of the crime . . . and on the char-

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*Proffitt* v. *Florida*, 428 U.S. 242, 252 (1976). The argument was noted in *Lockett* v. *Ohio*, 438 U.S. 586, 609 n. 16 (1978), but not reached. See *Gardner* v. *Florida*, 430 U.S. 349 (1977) (jury advised life sentence but judge imposed death upon basis of undisclosed presentence report; due process violated by nondisclosure but no indication in Court's opinions that overriding jury recommendation objectionable).

[10.5] *Gregg* v. *Georgia*, 428 U.S. 153, 188-195 (1976). Justice White seemed close to the plurality on the question of standards, id., 207 (concurring), but while Chief Justice Burger and Justice Rehnquist joined the White opinion "agreeing" that the system under review "comports" with *Furman*, at least Justice Rehnquist denied the constitutional requirement of standards in any event. *Woodson* v. *North Carolina*, 428 U.S. 280, 319-321 (1976) (dissenting). In *McGautha* v. *California*, 402 U.S. 183, 207-208 (1971), the Court had rejected the argument that the absence of standards violated the due process clause. On the vitiation of *McGautha*, see *Gregg*, *supra*, 195 n. 47, and *Lockett* v. *Ohio*, 438 U.S. 586, 598-599 (1978).

[11.5] *Gregg* v. *Georgia*, 428 U.S. 153, 163, 190-192, 195 (1976) (plurality opinion). *McGautha* v. *California*, 402 U.S. 183 (1971), had also rejected as a due process requisite bifurcated trials, and the *Gregg* plurality did not expressly require it under the Eighth Amendment. In its discussion of *McGautha* in *Gregg*, *supra*, 195 n. 47, it noted both holdings but limited the previous case explicitly only insofar as the difference on standards was relevant. But the plurality's emphasis upon avoidance of arbitrary and capricious sentencing by juries seems to look inevitably toward bifurcation. The dissenters, in Justice White's opinion, *Roberts* v. *Louisiana*, 428 U.S. 325, 337, 358 (1976), rejected bifurcation and viewed the plurality as requiring it.

[12.5] *Gregg* v. *Georgia*, 428 U.S. 153, 195, 198 (1976) (plurality); *Proffitt* v. *Florida*, 428 U.S. 242, 250-251, 253 (1976) (plurality); *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976) (plurality). The Stewart plurality does not expressly mandate this form of appellate review but it does seem to suggest that a system absent something like it would be suspect. Justice White's opinion approves the system's fairness without appearing to suggest that the process would fall without it. *Gregg*, *supra*, 211-212, 222-224. It should be noted that *Lockett* v. *Ohio*, 438 U.S. 586 (1978), by giving juries great discretion with respect to mitigating factors to consider, makes difficult the appellate comparison of individual sentences.

acteristics of the person who committed the crime".[13.5] Discretion was channeled and rationalized. But in *Lockett* v. *Ohio*,[14.5] the state law was invalidated because it prevented the sentencer from giving weight to any mitigating factors other than those specified in the law; in other words, the jury's discretion was curbed too much. "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." [15.5] Thus, a great measure of discretion is again accorded the sentencing authority, be it judge or jury, subject only to the consideration that the legislature must prescribe aggravating factors.[16.5]

In *Coker* v. *Georgia*,[17.5] the Court held that the state may not impose a death sentence upon a rapist who does not take a human life.[18.5] The Court announced that the standard under the Eighth Amendment was that punishments are barred when they are "excessive" in relation to the crime committed. A "punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals

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[13.5] *Gregg* v. *Georgia*, 428 U.S. 153, 197–198 (1976) (plurality). On the necessity that the standards be relatively precise and instructive in providing guidance, see *Godfrey* v. *Georgia*, 446 U.S. 420 (1980). Government may not enhance the risk of an unwarranted conviction and death sentence through its structuring of its capital system. *Beck* v. *Alabama*, 447 U.S. 625 (1980), held unconstitutional a statute which did not permit the jury the option of convicting on a lesser included offense. Because the jury had to choose between conviction or acquittal, the statute created the risk that it would convict because it felt defendant deserved to be punished or acquit because it believed death was too severe for the particular crime, when the jury should concentrate on determining whether the prosecution had proved beyond a reasonable doubt defendant's guilt of the offense.

[14.5] 438 U.S. 586 (1978). The opinion of the Court by Chief Justice Burger was joined only by Justices Stewart, Powell, and Stevens. Justices Blackmun, id., 613, Marshall, id., 619, and White, id., 621, concurred in the result on separate and conflicting grounds. Only Justice Rehnquist dissented. Id., 628.

[15.5] Id., 604 (plurality).

[16.5] "I greatly fear that the effect of the Court's decision today will be to compel constitutionally a restoration of the state of affairs at the time *Furman* was decided, where the death penalty is imposed so erratically and the threat of execution is so attenuated for even the most atrocious murders that 'its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes.'" Id., 623 (Justice White).

[17.5] 433 U.S. 584 (1977). Justice White's opinion was joined only by Justices Stewart, Blackmun, and Stevens. Justices Brennan and Marshall concurred on their view that the death penalty is per se invalid, id., 600, and Justice Powell concurred on a more limited basis than Justice White's opinion. Id., 601. Chief Justice Burger and Justice Rehnquist dissented. Id., 604.

[18.5] Although the Court states the issue in the context of the rape of an adult woman, id., 592, the opinion at no point seeks to distinguish between adults and children. Justice Powell's concurrence expressed the view that death is ordinarily disproportionate for the rape of an adult woman but that some rapes might be so brutal or heinous as to justify it. Id., 601.

of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[20.4] In order that judgment not be or appear to be the subjective conclusion of individual Justices, attention must be given to objective factors, predominantly "to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions. . . ."[20.5] While the Court thought that the death penalty for rape passed the first test, it felt it failed the second. Georgia was the sole State providing for death for the rape of an adult woman and juries in at least nine out of ten cases refused to impose death for rape. Aside from this view of public perception, the Court independently concluded that death is an excessive penalty for an offender who rapes but does not kill; rape cannot compare with murder "in terms of moral depravity and of injury to the person and the public."[20.6]

Other questions await the Court's consideration. The issue of whether capital punishment is barred in all cases in which human life is not taken is important; *Coker* may well have resolved that for all cases except for those in which a large threat, though uneventuated, to the lives of many may have been present, as in airplane hijackings.[20.7] The felony murder issue is still to be resolved.[20.8] Does the unique character of capital punishment impose upon courts and prosecutors restraints that the Court would not require in other criminal cases?[20.9]

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[20.4] Id., 592.

[20.5] Ibid.

[20.6] Id., 598.

[20.7] The federal law, 49 U.S.C. § 1472 imposes death only when death occurs during commission of the offense. But the treason statute does not and represents a situation in which great and fatal danger might be presented. 18 U.S.C. § 2381.

[20.8] Justice White concurring in *Lockett* v. *Ohio*, 438 U.S. 586, 621, 624 (1978), would have invalidated a death sentence as disproportionate for one lacking a purpose to cause the death of the victim. Justice Blackmun did not believe a disproportionality analysis to be "workable" in the felony murder context. Id., 613, 614.

[20.9] Thus, the due process holding in *Gardner* v. *Florida*, 430 U.S. 349 (1977), is informed in large part, but not exclusively, see id., 357-358, by the judicial recognition that death is a different kind of punishment. It is unclear whether *Gardner* applies in a noncapital case.

**[P. 1254, at end of first full paragraph, add:]**

Proportionality analysis in noncapital cases appears to have been closely cabined in *Rummell* v. *Estelle*,[1.5] but the division of the Court

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[1.5] 445 U.S. 263 (1980). The opinion, by Justice Rehnquist, was concurred in by Chief Justice Burger and Justices Stewart, White, and Blackmun. Dissenting were Justices Powell, Brennan, Marshall, and Stevens. Id., 285. The lower federal courts had begun developing proportionality standards largely like those considered and rejected in *Rummell*. See, e.g., *Hart* v. *Coiner*, 483 F.

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makes difficult the projection of future application of the doctrine. Defendant received a mandatory life sentence under a recidivist statute following his third felony conviction. The three nonviolent felonies had netted him a total of less than $230. Proportionality analysis appeared in the first part of the opinion to have been abandoned; the Court observed that because of the unique quality of the death penalty the attention in such cases to the gross disproportion of the sentence to the seriousness of the crime was of limited assistance and *Weems* was distinguished on the basis that the length of the sentence was of considerably less concern to the Court than were the brutal prison conditions and the postrelease denial of significant rights imposed under the peculiar Philippine penal code. Thus, in order to avoid improper judicial interference into state penal systems, Eighth Amendment judgments must be informed by objective factors to the maximum extent possible. But when the challenge to punishment goes to its length as compared to the seriousness of the offense, the choice is necessarily subjective. Therefore, the rule appears to be that States may punish any behavior properly classified as a felony with any length of imprisonment purely as a matter of legislative grace.[58]

Nonetheless, the Court did turn to treat the factors relied on by the defendant as demonstrating the disproportionality of the sentence and found them unavailing. First, the fact that the nature of the offense was nonviolent was found not necessarily relevant to the seriousness of a crime and the determination of what is a "small" amount of money, being so subjective, was a legislative task. In any event, the State could focus on recidivism, not the specific acts. Second, the comparison of punishment imposed for the same offenses in other jurisdiction was found unhelpful, differences and similarities being more subtle than gross, and in any case in a federal system one jurisdiction would always be more severe than the rest. Third, the comparison of punishment imposed for other offenses in the same State ignored the recidivism aspect.[59]

***Limitation of Clause to Criminal Punishments.***—Except when brutality is inflicted on a convicted prisoner serving a lawful term of imprisonment,[60] the Court has now held, the Eighth Amendment applies only in the context of judicial sentencing or legislative provision of sentences. "Bail, fines, and punishment traditionally have been as-

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2d 136 (C.A. 4, 1973), *cert. den.*, 415 U.S. 983 (1974). See also *Davis v. Zahradnick*, 432 F. Supp. 444 (D.W.D.Va. 1977), *rev'd. sub nom. Davis v. Davis*, 585 F. 2d 1226 (C.A. 4, 1978), *opinion vacated and district court opinion adopted*, 601 F. 2d 153 (C.A. 4, 1979) (*en banc*), *vacated and remanded sub nom. Hutto v. Davis*, 445 U.S. 947 (1980).

[58] *Rummell v. Estelle*, 445 U.S. 263, 271-275 (1980).

[59] Id., 275-282. The dissent deemed these three factors to be sufficiently objective to apply and thought they demonstrated the invalidity of the sentence imposed. Id., 285, 295-303.

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sociated with the criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal-law function of government. An examination of the history of the Amendment and the decisions of this Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those convicted of crimes." [2.a] So saying, the Court held that the infliction of corporal punishment upon schoolchildren for disciplinary purposes was not limited by the clause. Although it thought the history of the Amendment was clear, the Court also argued that the openness of the schools and their supervision by the community, when combined with the remedies afforded children wrongfully or excessively punished, argued against application of the clause.[3.a]

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[1.a] Although the treatment of convicted prisoners has long been treated in lower court opinions, both with respect to the abuse of individual prisoners, e.g., *Jackson* v. *Bishop*, 404 F. 2d 571 (C.A. 8, 1968) (beating prisoner with strap violates Eighth Amendment), and with respect to prison conditions found to be inhumane to the inmates, e.g. *Holt* v. *Sarver*, 309 F. Supp. 362 (D.C.E.D. Ark. 1970), *aff'd.*, 442 F. 2d 304 (C.A. 8, 1971), *district court ordered to retain jurisdiction until unconstitutional conditions corrected*, 505 F. 2d 194 (C.A. 8, 1974), it was not until *Estelle* v. *Gamble*, 429 U.S. 97 (1976), that the Supreme Court tentatively approved these developments, holding that deliberate medical neglect of prisoners violated the clause. See also *Hutto* v. *Finney*, 437 U.S. 678, 680–688 (1978) (a continuation of *Holt* v. *Sarver*). In *Ingraham* v. *Wright*, 430 U.S. 651, 669 (1977), the Court explained the prison cases as standing on the proposition that "brutality . . . is 'part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny.'"

[2.a] *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977). Four Justices dissented, Id., 683 (Justices White, Brennan, Marshall, and Stevens).

[3.a] Id., 669–670. See id., n. 37 (We have no occasion in this case . . . to consider whether or under what circumstances persons involuntarily confined in mental or juvenile institutions can claim the protection of the Eighth Amendment.")

## AMENDMENT 9—UNENUMERATED RIGHTS

**[P. 1259, add to N. 7:]**

Notice the recurrence to this Amendment as a "constitutional 'saving clause' " in Chief Justice Burger's plurality opinion in *Richmond Newspapers* v. *Virginia*, 448 U.S. 555, 579–580 & n. 15 (1980).

## AMENDMENT 10—RESERVED POWERS

### [P. 1263, add to N. 2:]

"While the Tenth Amendment has been characterised as a 'truism', stating merely that 'all is retained which has not been surrendered,' [citing *Darby*], it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry* v. *United States*, 421 U.S 542, 547 n. 7 (1975). This policy was effectuated in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

### [P. 1265, add to N. 7:]

The question was again canvassed in *Massachusetts* v. *United States*, 435 U.S. 444 (1978), but the result was inconclusive.

### [P. 1268, add to N. 11:]

This statement is no longer true since *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), even though the Court relied there not on the Tenth Amendment but upon restraint imposed upon the exercise of delegated federal powers by the very fact of the existence of the States, upon, that is, a principle of federalism epitomized by the Tenth Amendment.

# AMENDMENT 11—SUITS AGAINST STATES

## [P. 1276, add to N. 7:]

Notice the significantly different interpretation of state sovereign immunity in the federal constitutional context in *Nevada* v. *Hall*, 440 U.S. 410 (1979). In passing on the question whether one State may subject another State to suit in the first State's courts, the Court concluded that while during the framing of the Constitution the rule was that a State may not without its consent be sued that understanding was not embodied in the Constitution itself, except to the limited extent that the Eleventh Amendment restrained federal courts. Id., 418–421, 424–426. The dissenters would have found implicit constitutional assurance of state immunity as an essential component of federalism. Id., 427, 432.

## [P. 1276, in text following N. 8 add:]

Nothing in this Amendment nor elsewhere in the Constitution precludes one State from subjecting in its courts another State to suit. The Court could discern no evidence in the constitutional structure, in the specific language, or in the intention of the Framers that would impose a federal constitutional constraint upon such State action, although the Court did imply that some cases might pose a "substantial threat to our constitutional system of cooperative federalism" and occasion a different result. But the particular case, involving a controversy over a traffic accident, was hardly likely to interfere with the defendant State's capacity to fulfill its own sovereign responsibilities.[1.5]

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[1.5] *Nevada* v. *Hall*, 440 U.S. 410 (1979). The quoted phrase is at id., 424 n. 24.

## [P. 1277, add to N. 22:]

Whether a governmental entity is to be treated as an arm of the State, partaking of the State's immunity from suit under the Eleventh Amendment, or is to be treated as a municipal corporation or other political subdivision to which the Amendment does not extend, requires an examination of state law in order to determine what the nature of the entity is. *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 279–281 (1977). See *Lake County Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 400–402 (1979) (interstate agency created by compacting States does not have immunity).

In *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978), the Court overruled that portion of *Monroe* v. *Pape* that had held that municipalities were not "persons" within the meaning of 42 U.S.C. § 1983, providing for federal suits for damages and other relief in instances of official deprivations of rights guaranteed by the Constitution and federal statutes. See *Maine* v. *Thiboutot*, 448 U.S. 1 (1980) (construing the meaning of "laws" in § 1983). And see *Owen* v. *City of Independence*, 445 U.S. 622 (1980) (denying individual good faith defenses to entities). *Monell* specifically stated that the doctrine of *respondent* *superior* was not applicable in § 1983 suits; the statute applies only to action taken pursuant to official municipal policy—whether enacted through formal regulation or carried out pursuant to government "custom"—which caused a constitutional tort. Id., 436 U.S., 690–695. The Court's decision largely obviated consideration of a judicially implied cause of action for a constitutional tort, see *Bivens* v. *Six Unknown Named Agents of the Bureau of Narcotics*, 403 U.S. 388 (1971), which a number of courts had used to impose liability upon municipal corporations. E.g., *Turpin* v. *Mailet*, 579 F. 2d 152 (C.A. 2) (*en banc*), *vacated and remanded sub nom. City of West Haven* v. *Turpin*, 439 U.S. 974 (1978), *on remand*, 619 F. 2d 196 (C.A. 2, 1980).

*Carter* v. *Carlson*, cited in the *text* was reversed in *District of Columbia* v. *Carter*, 409 U.S. 418 (1973) (District of Columbia is not a "State" or Territory" for purposes of § 1983). Subsequently, Congress amended § 1983 to make the District of Columbia subject to it. P.L. 96–170, § 1, 93 Stat. 1284 (1979).

**[P. 1277, following N. 23 in text, add:]**

A substantial contraction of state immunity was recognized in *Fitzpatrick* v. *Bitzer*,[1.5] in which the Court held that Congress possessed the power under § 5 of the Fourteenth Amendment to enforce "by appropriate legislation" the guarantees of § 1 thereof, including the authorization of suits against the States and the collection of damages and attorneys' fees from the state treasuries. "[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies, . . . are necessarily limited, by the enforcement provisions of § 5 of the Fourteenth Amendment."[2.5] *Fitzpatrick* made clear that Congress may authorize persons to sue the States directly in federal courts, rather than those persons having to sue state officers, to remedy denials of due process, equal protection, and privileges and immunities of citizenship, as well as other rights guaranteed by Amendments subsequent to the Eleventh.[3.5] Whether Congress could consistent with the Eleventh Amendment override state immunity with respect to constitutional guarantees in the body of the Constitution or with respect to federal statutory rights, that is, whether the Amendment is a restraint only upon the power of the federal courts or whether it limits congressional power too, has not been definitively settled.[4.5] The Court, however, in-

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[1.5] 427 U.S. 445 (1976). Note Justice Stevens' concurrence. Id., 458. See also *Maher* v. *Gagne*, 448 U.S. 122 (1980); *Hutto* v. *Finney*, 437 U.S. 678 (1978).

[2.5] *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976).

[3.5] In *Quern* v. *Jordan*, 440 U.S. 332 (1979), the Court held that in enacting 42 U.S.C. § 1983, Congress had not intended to include States within the term "person" for the purpose of subjecting them to suit. *Quern* resolved the dispute among the Justices in *Hutto* v. *Finney*, 437 U.S. 678, 700 (1978) (Justice Brennan concurring), and id., 704 (Justice Powell concurring in part and dissenting in part), and inferentially settled in *Alabama* v. *Pugh*, 438 U.S. 781 (1978), whether *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978), necessitated a re-examination of state liability under § 1983.

[4.5] Difficulty lies in the fact that the Court frequently speaks in the same opinion in ways that imply both that the Eleventh Amendment is an absolute barrier, save for state consent, and that Congress may deprive States of it. E.g., *Employees of the Dept. of Public Health and Welfare* v. *Dept. of Public Health and Welfare*, 411 U.S. 279, 284 (1973), (under Eleventh Amendment "a federal sists that Congress, when it has the power, must be fairly clear with respect to its intent to impose liability on the States; imposition will not be inferred unless the statutory language so requires or the legislative history is persuasive that Congress did so intend and understood the effects of its enactment.[5.5]

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court is not competent to render judgment against a nonconsenting State"), and id., 285 ("It is not easy to infer that Congress in legislating pursuant to the Commerce Clause . . . desired silently to deprive the States of an immunity they have long enjoyed under another part of the Constitution."). Dicta in other cases appear to posit congressional power if it is clearly enunciated in its exercise. E.g., *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452 (1976); *Quern* v. *Jordan*, 440 U.S. 332, 340, 343–345 (1979). Justices Marshall and Stewart believe Congress may not lift state immunity in federal court, *Employees*, *supra*, 287 (concurring), while Justice Brennan believes Congress may. Id., 298 (dissenting).

It should be noted that even if Congress could not subject States to suit in federal court because of the Eleventh Amendment, it could provide for such suits in state courts, *Maine* v. *Thiboutot*, 448 U.S. 1, 9 n. 7 (1980), which presumably the state courts must hear. See *Martinez* v. *California*, 444 U.S. 277, 283 n. 7 (1980).

[5.5] Compare the different approaches to explicitness in the various opinions in *Hutto* v. *Finney*, 437 U.S. 678 (1978). See also *Quern* v. *Jordan*, 440 U.S. 332, 343–345 (1979); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 451–453 (1976).

### [P. 1278, add to N. 6:]

See also the discussion of waiver in *Edelman* v. *Jordan*, 415 U.S. S. 651, 671–674 (1974).

### [P. 1278, add to N. 9:]

Resolution of the immediate question came in *Employees of the Dept. of Public Health and Welfare* v. *Dept. of Public Health and Welfare*, 411 U.S. 279 (1973), in which the Court ruled that Congress had not attempted to authorize state employees to sue the State and therefore did not reach the issues of waiver and validity. The subsequent decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), overruling *Maryland* v. *Wirtz* and holding unconstitutional the extension of federal wage and hour laws to the States, moots the issue.

### [P. 1279, add to N. 5:]

See also *Scheuer* v. *Rhodes*, 416 U.S. 233 (1974).

### [P. 1279, add to N. 6:]

See also *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

### [P. 1281, add to N. 20:]

For a particularly striking example, see *Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 719 (1980), permitting a suit to enjoin the state court from enforcement of certain sections of an attorney disciplinary code, although the court was immune from suit as legislators charged with formulating and promulgating the code.

**[P. 1282, add new paragraph in text following N. 24:]**

In *Edelman* v. *Jordan*,[1.5] the Court held that *Ex parte Young*, while authorizing suit in federal court to require state officials to comply in the future with claims payment provisions of the welfare assistance sections of the Social Security Act, did not permit federal courts to hear suits claiming retroactive payment of funds found to be wrongfully withheld. Conceding that some of the characteristics of prospective and retroactive relief would be the same in their effects upon the state treasury, the Court nonetheless believed that retroactive payments were equivalent to the imposition of liabilities which must be paid from public funds in the state treasury and which was barred by the Eleventh Amendment. The spending of money from the state treasury by state officials shaping their conduct in accordance with a prospective-only injunction is "an ancillary effect" which "is a permissible and often an inevitable consequence" of *Ex parte Young*, whereas "payment of state funds . . . as a form of compensation" to those wrongfully denied the funds in the past "is in practical effect indistinguishable in many aspects from an award of damages against the State."[2.5]

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[1.5] 415 U.S. 651 (1974).

[2.5] Id., 668. Compare *Quern* v. *Jordan*, 440 U.S. 332, 346–349 (1979).

**[P. 1282, following N. 2 in text, add:]**

Thus, in *Scheuer* v. *Rhodes*,[2.5] the Court unanimously held that plaintiffs were not barred by the Amendment from suing state officials alleging that they deprived persons of a federal right under color of state law when it is clear the plaintiffs are seeking to impose individual and personal liability on the officials. Further, the Court indicated, the officials were not protected by any concept of absolute "executive immunity." Rather, the immunity of state officials is qualified and varies according to the scope of discretion and responsibilities of the particular office and the circumstances existing at the time the challenged action was taken.

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[2.5] 416 U.S. 232 (1974).

# AMENDMENT 13—SLAVERY AND INVOLUNTARY SERVITUDE

**[P. 1293, add to N. 24:]**

The expansiveness of the 1866 statute is revealed in *Runyon* v. *McCrary*, 427 U.S. 160 (1976) (guarantee that all persons shall have the same right to make and enforce contracts as is enjoyed by white persons protects the right of black children to gain admission to private, commercially operated, nonsectarian schools); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459–460 (1975) (statute affords a federal remedy against discrimination in private employment on the basis of race); *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285–296 (1976) (statute protects against racial discrimination in private employment against whites as well as nonwhites). See also *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973).

# AMENDMENT 14—RIGHTS GUARANTEED

## Substantive Due Process

### [P. 1316, add to N. 22:]

While the Court continues to assert the nonexistence of substantive due process when reviewing economic regulations, *Dean* v. *Gadsden Times Pub. Co.*, 412 U.S. 543 (1973); *North Dakota State Bd. of Pharmacy* v. *Snyder's Drug Stores*, 414 U.S. 156, 164–167 (1973); *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 124–125 (1978), *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 106–108 (1978), clearly the doctrine is alive in what may be denominated personal liberty situations, e.g., *Roe* v. *Wade*, 410 U.S. 113 (1973). See the express reliance in *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion); *Zablocki* v. *Redhail*, 434 U.S. 374, 391 (1978) (Justice Stewart concurring).

### [P. 1317, add to N. 2:]

In *First National Bank* v. *Bellotti*, 435 US. 765 (1978), faced with the validity of state restraints upon expression by corporations, which were not press corporations, the Court did not determine that corporations have First Amendment liberty rights—and other constitutional rights—identical to those of individuals but decided instead that the expression was protected, irrespective of the speaker. The question of corporate constitutional rights was reserved. Id., 778 n. 14. But see id., 809, 822 (Justices White and Rehnquist dissenting) (corporations as creatures of the state have the rights the state gives them).

### [P. 1317, add to N. 5:]

But see *Madison School Dist.* v. *WERC*, 429 U.S. 167, 175 n. 7 (1976) (reserving the question whether municipal corporation as an employer has a First Amendment right assertable against State).

### [P. 1317, add to N. 7:]

See *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978) (police power encompasses preservation of historic landmarks; land-use restrictions may be enacted to enhance the quality of life by preserving the character and desirable aesthetic features of a city); *Agins* v. *City of Tiburon*, 447 U.S. 225 (1980). See also *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976); *Young* v. *American Mini Theatres*, 427 U.S. 50 (1976).

### [P. 1318, add to N. 11:]

See *Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978); *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980).

### [P. 1319, append to the paragraph entitled "Liberty" n. 1.5 and add:]

[1.5] See the tentative effort in *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 102 and n. 23 (1976), apparently to expand upon the concept of "liberty" within the meaning of the Fifth Amendment's due process clause and necessarily therefore the Fourteenth's. But see also the substantial confinement of the concept in *Meachum* v. *Fano*, 427 U.S. 215 (1976), and *Montanye* v. *Haymes* 427 U.S. 236 (1976), in which the Court applied to its determination of what is a liberty interest the "entitlement" doctrine developed in property cases in which the interest is made to depend upon state recognition of the interest through positive law, an approach contrary to previous due process-liberty analysis. Compare *Morrissey* v. *Brewer*, 408 US. 471, 482 (1972).

**[P. 1325, add to N. 8:]**

See also *Dean* v. *Gadsden Times Pub. Co*, 412 U.S. 543 (1973) (sustaining statute providing that employee excused for jury duty should be entitled to full compensation from employer, less jury service fee).

**[P. 1355, add to N. 8:]**

See also *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 106–108 (1978).

**[P. 1362, in text following N. 12, add:]**

This case was overruled, however, when the Court sustained a law establishing as a qualification for obtaining or retaining a pharmacy operating permit that one either be a registered pharmacist in good standing or that the corporation or association have a majority of its stock owned by registered pharmacists in good standing who were actively and regularly employed in and responsible for the management, supervision, and operation of such pharmacy.[1.5]

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[1.5] *North Dakota State Bd. of Pharmacy* v. *Snyder's Drug Stores*, 414 U.S. 156 (1973).

**[P. 1368, in text following N. 12, add:]**

A village land use ordinance restricting housing in the community to one-family dwellings, in which any number of persons related by blood, adoption, or marriage could occupy a house but only two unrelated persons could do so was sustained as a valid exercise of the police power in the public interest, absent a showing that it was aimed at the deprivation of a "fundamental interest." [2.5] Such a fundamental interest was found impaired by a zoning ordinance in *Moore* v. *City of East Cleveland*,[3.5] which restricted housing occupancy to a single family but so defined "family" that a grandmother who had living with her two grandsons of different children was in violation of the ordinance. The Court was divided, both in result and in rationales, thus leaving unclear whether zoning laws are to be more closely scrutinized in the future than they have been.[4.5]

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[2.5] *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974).

[3.5] 431 U.S. 494 (1977).

[4.5] A plurality of the Court voted to strike down the ordinance because it violated substantive due process; family living arrangements are protected liberty interests which may not be interfered with by government except upon a showing of important governmental interests which the means adopted serve. Id., 498–506 (Justices Powell, Brennan, Marshall, and Blackmun). Justice Stevens concurred on the basis that zoning ordinances may only be pronounced unconstitutional if they are shown to be clearly arbitrary and unreasonable and he thought the ordinance here failed the standard. Id., 513. Justices Stewart, Rehnquist, and White dissented on substantive grounds, id., 531, 541, as did Chief Justice Burger on procedural grounds. Id., 521. Note *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980).

**[P. 1374, add to N. 1:]**

See *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60, 75 (1978) (seeming to conflate the due process and equal protection standards in political rights cases).

**[P. 1376, add to N. 14:]**

For a State to tax income generated in interstate commerce, the due process clause imposes two requirements: a "minimal connection" between the interstate activities and the taxing State and a rational relationship between the income attributed to the State and the intrastate values of the enterprise. *Mobil Oil Corp.* v. *Comr. of Taxes*, 445 U.S. 425, 436–437 (1980); *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 272–273 (1978).

Maintenance of full-time employee within State to make possible the realization and continuance of a valuable contractual relationship made almost frivolous the argument that the tax was not balanced by protection and benefits conferred by the State. *Standard Pressed Steel Co.* v. *Dept. of Revenue*, 419 U.S. 560, 562 (1975). See also *National Geographic Society* v. *California Bd. of Equalization*, 430 U.S. 551 (1977).

**[P. 1394, add to N. 4:]**

The Court has recently considered and expanded the ability of the States to use apportionment formulae to allocate to each State for taxing purposes a fraction of the income earned by an integrated business conducted in several States as well as abroad. *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267 (1978); *Mobil Oil Corp.* v. *Comr. of Taxes*, 445 U.S. 425 (1980); *Exxon Corp.* v. *Dept. of Revenue*, 447 U.S. 207 (1980). *Exxon* refused to permit a unitary business to use separate accounting techniques that divided its profits among its various functional departments to demonstrate that a State's formulary apportionment taxed extraterritorial income improperly. *Bair, supra*, 276–280, implied that a showing of actual multiple taxation was a necessary predicate to a due process challenge but might not be sufficient.

**[P. 1406, in text following N. 16, add:]**

**Abortion.**—Laws limiting or prohibiting abortions in practically all the States, the District of Columbia, and the territories were invalidated by a ruling recognizing a right of personal privacy protected by the due process clause that included a qualified right of a woman to determine whether to bear a child or not.[1.5] On the basis of its analysis

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[1.5] *Roe* v. *Wade*, 410 U.S. 113 (1973). A companion case was *Doe* v. *Bolton*, 410 U.S. 179 (1973). The opinion by Justice Blackmun was concurred in by Justices Douglas, Brennan, Stewart, Marshall, and Powell, and Chief Justice Burger. Justices White and Rehnquist dissented, id., 171, 221, arguing that the Court should follow the traditional due process test of determining whether a law has a rational relation to a valid state objective and that so judged the statute was of the competing individual rights and state interests, the Court discerned a three-stage balancing of rights and interests extending over the full nine-month term of pregnancy.

"(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

"(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

"(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." [2.5]

A lengthy history of the medical and legal views of abortion apparently convinced the Court that the prohibition of abortion lacked the solid foundation necessary to preserve such prohibitions from constitutional review now.[3.5] Similarly, a review of the concept of "person" as protected in the due process clause and in other provisions of the Constitution established to the Court's satisfaction that the word "person" did not include the unborn and therefore that the unborn lacked federal constitutional protection.[4.5] Without treating the question in more than summary fashion, the Court announced that "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist in the Constitution" and that it is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action." [5.5] "This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." [6.5] Moreover, this right of privacy is "fundamental" and, drawing upon the strict standard of review in equal protection litigation, the Court held that the due process clause required that regulations limiting this fundamental right may be justified only by a "compelling state interest" and must be narrowly drawn to express only the legitimate state interests at stake.[7.5] Assessing the possible interests of the States, the Court rejected as unsupported in the record and ill-served by the laws in question justifications relating to the promotion of morality

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valid. Justice Rehnquist was willing to consider an absolute ban on abortions even when the mother's life is in jeopardy to be a denial of due process, id., 173, while Justice White left the issue open. Id., 223.

[2.5] *Roe v. Wade*, 410 U.S. 113, 164–165 (1973).

[3.5] Id., 129–147.

[4.5] Id., 156–159.

[5.5] Id., 152, 153.

[6.5] Ibid.

[7.5] Id., 152, 155–156. The "compelling state interest" test in equal protection cases is reviewed in *text, pp. 1474–1477.*

and the protection of women from the medical hazards of abortions. The state interest in protecting the life of the fetus was held to be limited by the lack of a social consensus with regard to the issue when life begins. Two valid state interests were recognized, however. "[T]he State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman . . . [and] it has still *another* important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.' "[8.5]

This approach led to the three-stage concept quoted above. Because medical data indicated that abortion prior to the end of the first trimester is relatively safe, the mortality rate being lower than the rates for normal childbirth, and because the fetus has no capability of meaningful life outside the mother's womb, the State has no "compelling interest" in the first trimester and "the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated."[9.5] In the intermediate trimester, the danger to the woman increases and the State may therefore regulate the abortion procedure "to the extent that the regulation reasonably relates to the preservation and protection of maternal health", but the fetus is still not able to survive outside the womb so that the actual decision to have an abortion cannot be otherwise impeded.[10.5] "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." [11.5]

In a companion case, the Court struck down three procedural provisions of a permissive state abortion statute.[12.5] These required that the abortion be performed in a hospital accredited by a private accrediting organization, that the operation be approved by the hospital staff abortion committee, and that the performing physician's judgment be confirmed by the independent examination of the patient by two other licensed physicians. These provisions were held not to be justified by the State's interest in maternal health because they were

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[8.5] 410 U.S., 147–152, 159–163.

[9.5] Id., 163.

[10.5] Ibid.

[11.5] Id., 163–164. A fetus becomes "viable" when it is "potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." Id., 160 (footnotes omitted).

[12.5] *Doe* v. *Bolton*, 410 U.S. 179 (1973).

not reasonably related to that interest.[13.5] And a residency provision was struck down as violating the privileges and immunities clause.[14.5] But a clause making the performance of an abortion a crime except when it is based upon the doctor's "best clinical judgment that an abortion is necessary" was upheld against vagueness attack and was further held to benefit women seeking abortions inasmuch as the doctor could utilize his best clinical judgment in light of all the attendant circumstances.[15.5]

These decisions were reaffirmed and extended when subsequently the Court was faced with a restrictive state statute enacted after *Roe* making access to abortions contingent upon spousal or parental consent and imposing restraints upon methods.[16.5] Striking down all the substantial limitations, the Court held (1) that the spousal consent provision was an attempt by the State to delegate a veto power over the decision of the woman and her doctor that the State itself could not exercise,[17.5] (2) that no significant state interests justified the imposition of a blanket parental consent requirement as a condition of the obtaining of an abortion by an unmarried minor during the first 12 weeks of pregnancy,[18.5] and (3) that a criminal provision requiring the

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[13.5] Id., 192–200.

[14.5] Id., 200. The clause is Article IV, § 2. See *text*, pp. 830–833.

[15.5] 410 U.S., 191–192. "[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." Id., 192. Presumably this discussion applies to the Court's ruling in *Roe* holding that even in the third trimester the woman may not be forbidden to have an abortion if it is necessary to preserve her health as well as her life, 410 U.S., 163–164, a holding which is unelaborated in the opinion. See also *United States* v. *Vuitch*, 402 U.S. 62 (1971).

[16.5] *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976). See also *Bellotti* v. *Baird*, 443 U.S. 622 (1979) (parental consent to minor's abortion); *Colautti* v. *Franklin*, 439 U.S. 379 (1979) (imposition on doctor determination of viability of fetus and obligation to take life-saving steps); *Singleton* v. *Wulff*, 428 U.S. 106 (1976) (standing of doctors to litigate right of patients to Medicaid-financed abortions); *Bigelow* v. *Virginia*, 421 U.S. 809 (1975) (ban on newspaper ads for abortions); *Connecticut* v. *Menillo*, 423 U.S. 9 (1975) (state ban on performance of abortion by "any person" may constitutionally be applied to prosecute nonphysicians performing abortions).

[17.5] *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 67–72 (1976). The Court recognized the husband's interests and the state interest in promoting marital harmony. But the latter was deemed not served by the requirement, and, since when the spouses disagree on the abortion decision one has to prevail, the Court thought the person who bears the child and who is the more directly affected should be the one to prevail. Justices White and Rehnquist and Chief Justice Burger dissented. Id., 92.

[18.5] Id., 72–75. Minors have rights protected by the Constitution, but the States have broader authority to regulate their activities than those of adults. Here, the Court perceived no state interest served by the requirement that overcomes the woman's right to make her own decision; it emphasized that it was not holding that every minor, regardless of age or maturity, could give effective consent for an abortion. Justice Stevens joined the other dissenters on this part of the holding. Id., 101. In *Bellotti* v. *Baird*, 443 U.S. 622 (1979), eight Justices attending physician to exercise all care and diligence to preserve the life and health of the fetus without regard to the stage of viability was inconsistent with *Roe.*[19.5] Sustained were provisions that required the woman's written consent to an abortion with assurances that it is informed and freely given and provisions mandating reporting and recordkeeping for public health purposes with adequate assurances of confidentiality. A provision that barred the use of the most commonly used method of abortion after the first 12 weeks of pregnancy was declared unconstitutional since in the absence of another comparably safe technique it did not qualify as a reasonable protection of maternal health and it instead operated to deny the vast majority of abortions after the first 12 weeks.[20.5]

But when the Court dealt with the issue of public funding to pay for abortions for the pregnant indigent, it drew back from the broad holdings previously issued and held that neither due process nor equal protection required government to use public funds for this purpose.[21.5] Due process, the Court held, does not obligate the States to pay the pregnancy-related medical expenses of indigent women, even though both abortion and the right to bear the child to birth are "fundamental" rights.[22.5] But the more critical question was the equal protection restraint imposed when government does provide public funds for medical care to indigents; may it accord differential treatment to abortion and childbirth and prefer the latter? The States may do so, the Court continued, because it is rationally related to a lawful purpose to encourage normal childbirth. The use of the rational basis test required a rejection of the compelling state interest test in the following manner. First, the more severe test was not activated by a classification impacting on a suspect class, wealth or indigency not being such a class. Second,

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agreed a parental consent law was void but split on the reasoning. Four Justices would hold that neither parents nor a court could be given an absolute veto over a minor's decision, while four others would hold that if parental consent is required the State must afford an expeditious access to court to review the parental determination and set it aside in appropriate cases.

[19.5] *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 81–84 (1976). A law requiring a doctor, subject to penal sanction, to determine if a fetus is viable or may be viable and to take steps to preserve the life and health of viable fetuses was held to be unconstitutionally vague. *Colautti* v. *Franklin*, 439 U.S. 379 (1979).

[20.5] *Planned Parenthood* v. *Danforth*, 428 U.S. 52, 75–79 (1976).

[21.5] *Maher* v. *Roe*, 432 U.S. 464 (1977); *Harris* v. *McRae*, 448 U.S. 297 (1980). See also *Beal* v. *Doe*, 432 U.S. 438 (1977) (States are not required by federal law to fund abortions); *Harris* v. *McRae*, *supra*, 306–311 (same). The state restriction in *Maher*, *supra*, 466, applied to nontherapeutic abortions, whereas the federal law barred funding for most medically necessary abortions as well, a distinction the Court deemed irrelevant, *Harris*, *supra*, 323, although it provided the basis for reaching different results for Justice Stevens. Id., 349 (dissenting).

[22.5] *Maher*, 432 U.S., 469 & n. 5; *Harris*, 448 U.S., 312–318.

and most significant for abortion adjudication, the Court held that state refusal to pay for abortions did not impinge upon a fundamental right. Prior state restrictions which had been invalidated, the Court continued, had created absolute obstacles to the obtaining of an abortion, had barred the obtaining of an abortion. While a state-created obstacle need not be absolute to be impermissible, it must at least at a minimum "unduly burden" the right to terminate a pregnancy. To allocate public funds so as to further a state interest in normal childbirth does not create an absolute obstacle to obtaining an abortion nor does it unduly burden the right. The condition—indigency—that is the barrier to getting an abortion was not created by government nor does the State add to the burden that exists already. "An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the services she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there."[38.5] Applying the same principles, the Court held that a municipal hospital could constitutionally provide hospital services for indigent women for childbirth but deny services for abortion.[38.6]

While the most recent decisions, especially in the development of a concept of absolute obstacles and permissible burdening, indicate some falling away within the Court from a commitment to the breadth of the holding in *Roe* and *Doe*, it is not at all clear that for litigation purposes the effect will be much felt outside the area that gave rise to the cases, public provision of services to indigents.

***Privacy: Its Constitutional Dimensions.***—Collaterally, the effect of the abortion decisions could have been greatest in the area of personal liberties beyond the issue of termination of pregnancy, inasmuch as the revitalization of substantive due process in the noneconomic regulation area, overlaid with the compelling state interest test, could call into question many governmental restraints upon the person. The Court's emphasis upon the privacy rationale seemed to presage an active judicial role in defining and protecting the interests of persons "to be let alone." Those developments have, however, not occurred and the cases reflect the intention of the court to curb the expansion of any doctrinal ramifications flowing beyond the abortion cases.

Privacy has in a number of cases been identified as a core value of the provisions of the Bill of Rights,[1.6] but it was not until *Griswold* v.

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[38.5] *Maher*, 432 U.S., 469–474 (the quoted sentence is id., 474); *Harris*, 448 U.S., 321–326. Justices Brennan, Marshall, and Blackmun dissented in both cases and Justice Stevens joined them in *Harris*.

[38.6] *Poelker* v. *Doe*, 432 U.S. 519 (1977).

[1.6] E.g., Fourth Amendment. See *text, pp. 1045–1047.*

*Connecticut* [2.5] that an independent right of privacy, derived from the confluence of several provisions of the Bill of Rights or discovered in the "penumbras" of these provisions, was expounded by the Court and actually used to strike down a governmental restraint. The abortion cases extended *Griswold* many degrees in several respects. First, the cases removed any lingering possibility that the right is a marital one that depends upon the relationship.[3.5] Second, the right of privacy was denominated a liberty which found its source and its protection in the due process clause of the Fourteenth Amendment.[4.5] Third, by designating the right as a "fundamental" right, the Court required a governmental restraint to be justified by a "compelling state interest." [5.5] Necessary to assessment of the effect of this development is a close analysis of the limits of the right thus protected as well as of its contents.

"The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner* v. *Oklahoma*, 316 U.S. 535, 541–542 (1942); contraception, *Eisenstadt* v. *Baird*, 405 U.S., at 453–454; id., at 460, 463–465 (White, J., concurring in result); family relationships, *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925), *Meyer* v. *Nebraska*, supra." [6.5] In the pornography cases decided later in the same Term, the Court denied the existence of any privacy right of customers to view unprotected material in commercial establishments, repeating the above descriptive language from *Roe*, and saying further: "the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship. Such protected privacy extends to the doctor's office, the hospital,

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[2.5] 381 U.S. 479 (1965). *Text, pp. 1258–1259, 1045–1047.*

[3.5] In *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), the Court had declined to extend the *Griswold* principle to the unmarried on privacy grounds, relying on an equal protection analysis instead. *Text, p. 1492.*

[4.5] *Roe* v. *Wade*, 410 U.S. 113, 153 (1973). See id., 167–171 (Justice Stewart concurring) Justice Douglas continued to deny that substantive due process is the basis of the decisions. *Doe* v. *Bolton*, 410 U.S. 179, 209, 212 n. 4 (1973) (concurring).

[5.5] *Supra, p. S207, n. 7.5.*

[6.5] *Roe* v. *Wade*, 410 US. 113, 152 (1973).

the hotel room, or as otherwise required to safeguard the right to intimacy involved."[7.8]

What is apparent from the Court's approach in these cases is that its concept of privacy is descriptive rather than analytical, making difficult an assessment of the potential of the doctrine. Privacy as a concept appears to encompass at least two different but related aspects. First, it relates to the right or the ability of individuals to determine how much and what information about themselves is to be revealed to others. Second, it relates to the idea of autonomy, the freedom of individuals to perform or not perform certain acts or subject themselves to certain experiences.[8.8] Governmental commands to do or not to do something may well implicate one or the other or both of these aspects and judicial decision about the validity of such governmental commands must necessarily be informed by use of an analytical framework balancing the governmental interests against the individual interests in maintaining freedom in one or both of the aspects of privacy. That framework cannot now be constructed on the basis of the Court's decided cases.

*Griswold* v. *Connecticut*,[9.8] voiding a state statute proscribing the use of contraceptives, seems primarily to be based upon a judicial concept of privacy flowing from the first aspect of privacy described above. That is, the predominant concern flowing through the several opinions is the threat of forced disclosure about the private and intimate lives of persons through the pervasive surveillance and investigative efforts that would be needed to enforce such a law; moreover, the concern was not limited to the outward pressures upon the confines of such provisions as the Fourth Amendment's search and seizure clause but extended to techniques that would have been within the range of permissible investigation. Subsequent cases, however, have returned to Fourth and Fifth Amendment principles to regulate official invasions of privacy.[10.8]

For example, in *United States v. Miller*, [11.8] the Court evaluated in Fourth Amendment terms the right of privacy of depositors in restricting Government access to their cancelled checks maintained by the bank as required by the Bank Secrecy Act. The cancelled checks, the Court held, were business records of the bank in which the depositors had no expectation of privacy and therefore no Fourth Amendment standing to challenge government legal process directed

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[7.8] *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49, 66, n. 13 (1973).

[8.8] *Whalen* v. *Roe*, 429 U.S. 589, 598–600 (1977).

[9.8] 381 U.S. 479 (1965).

[10.8] E.g., *California Bankers Assn.* v. *Schultz*, 416 U.S. 21 (1974). See also *Laird* v. *Tatum*, 408 U.S. 1 (1972); *United States* v. *United States District Court*, 407 U.S. 297 (1972); *United States* v. *Dionisio*, 410 U.S. 1 (1973); *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978).

[11.8] 425 U.S. 435 (1976). See also *Fisher* v. *United States*, 425 U.S. 391, 401 (1976); *Paul* v. *Davis*, 424 U.S. 693, 712–713 (1976); *United States* v. *Bisceglia*, 420 U.S. 141 (1975).

to the bank and this status was unchanged by the fact that the banks kept the records under government mandate in the first place. And in *Fisher* v. *United States*,[12.5] the Court denied the Fifth Amendment's self-incrimination clause operated in any way to prevent the IRS to obtain by summons the tax records of taxpayers prepared by their accountants and in the hands of either the taxpayer or his attorney, no matter how incriminating, because the Amendment only protects against compelled testimonial self-incrimination. "[T]he Court has never suggested that every invasion of privacy violates the privilege. Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort."[13.5] Further, "[w]e cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment."[14.5] The First Amendment itself affords some limitation upon governmental acquisition of information but here again the gravamen is a violation of speech or association or the like concomitant with exposure of personal information and not exposure itself.[15.5]

A cryptic opinion in *Whalen* v. *Roe*[16.5] may indicate the Court's willingness to recognize privacy interests as independent constitutional rights. At issue was a state pervasive regulation of prescription drugs that could be abused and the centralized recordkeeping through computers of all such prescriptions identifying the patients. The scheme was attacked on the basis that it invaded privacy interests against disclosure and privacy interests involving autonomy of persons in choosing whether to have the medication. The Court appeared to agree that both interests are protected but because the scheme was surrounded with extensive security protection against disclosure beyond that necessary to achieve the purposes of the program it was not thought to "pose a sufficiently grievous threat to either interest to establish a constitutional violation."[17.5]

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[12.5] 425 U.S. 391 (1976).

[13.5] Id., 399.

[14.5] Id., 401.

[15.5] See *Buckley* v. *Valeo*, 424 U.S. 1, 60–82 (1976); *Whalen* v. *Roe*, 429 U.S. 589, 601 n. 27, 604 n. 32 (1977); see also *United States* v. *Miller*, 425 U.S. 435, 444 n. 6 (1976). The Court continues to reserve the question of the "[s]pecial problems of privacy which might be presented by subpoena of a personal diary." *Fisher* v. *United States*, 425 U.S. 391, 401 n. 7 (1976).

[16.5] 429 U.S. 589 (1977).

[17.5] Id., 598–604. The Court cautioned that it had not decided anything with respect to the privacy implications of the accumulation of vast amounts of information in data banks and the threat of disclosure of it. Safeguarding such infor-

Not the method of enforcement but the fact of enforcement was the issue in *Roe* and *Doe*. That is, the power of the State to deny women access to abortions, the power to proscribe the effectuation of the will and desire of women to terminate pregnancy, was at issue. Because the Court determined that the will and desire constituted a protected "liberty", the State was required to justify its proscription by a compelling interest. Once the question of the personhood of the fetus was resolved, the Court confronted in effect only two asserted interests. The health of the mother was recognized as a valid interest, thus, as we shall see, departing from a *laissez faire* "free will" approach to individual autonomy. A state interest in morality was mentioned by the Court, not because the State had raised it, but simply to defer deciding it; however, the morality issue raised concerned not the morality of abortion but the promotion of sexual morality through making abortion unavailable.[18.5]

*Stanley* v. *Georgia*,[19.5] holding that government may not make private possession of obscene materials for private use a crime, approaches a judicial recognition of the autonomy aspect of privacy. True it is that the possession there was in Stanley's home, a fact heavily relied on by the Court, but the police had lawfully invaded his privacy upon the authority of a valid warrant and a subsidiary Fourth Amendment issue that was available for decision was passed over in favor of a broader resolution. Inasmuch as the materials were obscene, they were outside the scope of First Amendment protection. But the Court premised its decision upon one's protected right to receive what information and ideas he wished and upon one's protected "right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy."[20.5] These rights were held superior to the interests Georgia asserted to override them. That is, first, the State was held to have no authority to protect an individual's mind from the effects of obscenity, to promote the moral content of one's thoughts. Second, the State's assertion that exposure to obscenity may lead to deviant sexual behavior was rejected

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mation from disclosure "arguably has its roots in the Constitution", at least "in some circumstances", the Court seemed to indicate. Id., 605. Compare id., 606 (Justice Brennan concurring), with id., 607 (Justice Stewart concurring). What the Court's careful circumscription of the privacy issue through balancing does to the concept is unclear after *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 455–465 (1977), but note the dissents. Id., 504, 525–536 (Chief Justice Burger), and 545 n. 1 (Justice Rehnquist).

[18.5] *Roe* v. *Wade*, 410 U.S. 113, 148 (1972). Additionally, if the purpose of the statute was to deter illicit sexual conduct, the law was overbroad since it included both unmarried and married women. This morality rationale also fell afoul of overinclusion and underinclusion in *Eisenstadt* v. *Baird*, 405 U.S. 438, 447–450 (1972).

[19.5] 394 U.S. 557 (1969).

[20.5] Id., 564–565.

on the basis of a lack of empirical support and, more important, on the basis that less intrusive deterrents were available. Thus, a right to be free of governmental regulation in this area was clearly recognized.

*Stanley* was quickly restricted to its facts, to possession of pornography in the home.[21.5] But in its important reconsideration of and reaffirmation of governmental interests in the control of pornography, the Court went beyond this restriction and recognized governmental interests that included the promotion of public morality, protection of the individual's physiological health, and improving the quality of life. "It is argued that individual 'free will' must govern, even in activities beyond the protection of the First Amendment and other constitutional guarantees of privacy, and that government cannot legitimately impede an individual's desire to see or acquire obscene plays, movies, and books. We do indeed base our society on certain assumptions that people have the capacity for free choice. Most exercises of individual free choice—those in politics, religion, and expression of ideas—are explicitly protected by the Constitution. Totally unlimited play for free will, however, is not allowed in our or any other society. . . . [Many laws are enacted] to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition." Furthermore, continued the Court: "Our Constitution establishes a broad range of conditions on the exercise of power by the States, but for us to say that our Constitution incorporates the proposition that conduct involving consenting adults is always beyond state regulation is a step we are unable to take. . . . The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as 'wrong' or 'sinful.' The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States' 'right . . . to maintain a decent society.' "[22.5]

Evidently, then, the fundamental right of privacy that is protected by the due process clause is one functionally related to "family, marriage, motherhood, procreation, and child rearing."[23.5] Even so limited the concept can have numerous significant aspects occasioning major constitutional decisions. Thus, in *Carey* v. *Population Services International*,[24.5] the *Griswold-Baird* line of cases was significantly extended so as to make the "decision whether or not to beget or bear a child" a "constitutionally protected right of privacy" interest that government may not forbid or burden without justifying the limitation by a compelling state interest and by a regulation narrowly drawn

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[21.5] *United States* v. *Reidel*, 402 U.S. 351, 354–356 (1971); *United States* v. *Thirty-seven Photographs*, 402 U.S. 363, 375–376 (1971).

[22.5] *Paris Adult Theatre* v. *Slaton*, 413 U.S. 49, 57–63, 63–64, 68–69 (1973); and see id., 68 n. 15.

[23.5] Id., 66 n. 13. See also *Paul* v. *Davis*, 424 U.S. 693, 713 (1976).

[24.5] 431 U.S. 678 (1977).

to express only that interest or interests. This "constitutional protection of individual autonomy in matters of childbearing" led the Court to invalidate a state statute that banned the distribution of contraceptives to adults except by licensed pharmacists and that forbade any person to sell or distribute contraceptives to a minor under 16.[25.5] As to the former, limitation of the number of outlets to adults "imposes a significant burden on the right of the individuals to use contraceptives if they choose to do so" and was unjustified by any interest put forward by the State. As to the latter, instead of the compelling state interest test, the Court applied to state restrictions on the privacy rights of minors a test of validity requiring that they serve "any significant state interest . . . that is not present in the case of an adult." This test is "apparently less rigorous" than the test used with adults, a distinction justified by the greater governmental latitude in regulating the conduct of children and the lesser capability of children in making important decisions. The attempted justification for the ban was rejected. Doubting the permissibility of a ban on access to contraceptives to deter minors' sexual activity, the Court even more doubted, because the State presented no evidence, that limiting access would deter minors from engaging in sexual activity.[1.6]

Important as the result of *Carey* is to resolution of the immediate issue before the Court, even more important would be extension of the principle there firmly established—the "constitutionally protected right of decision in matters of childbearing"—to the wider question of the degree to which government may regulate or ban sexual activities of adults, with wide implications for questions of homosexuality as well as other relationships.[2.6] And, similarly, the extent to which gov-

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[25.5] Id., 684–691. The opinion of the Court on the general principles drew the support of Justices Brennan, Stewart, Marshall, Blackman, and Stevens. Justice White concurred in the result in the voiding of the ban on access to adults while not expressing an opinion on the Court's general principles. Id., 702. Justice Powell agreed the ban on access to adults was void but concurred in an opinion significantly more restrained than the opinion of the Court. Id., 703. Chief Justice Burger, id., 702, and Justice Rehnquist, id., 717, dissented.

[1.6] Id., 691–699. This portion of the opinion was supported by only Justices Brennan, Stewart, Marshall, and Blackmun. Justices White, Powell, and Stevens concurred in the result, id., 702, 703, 712 each on more narrow grounds than the plurality. Again, Chief Justice Burger and Justice Rehnquist dissented. Id., 702, 717.

[2.6] In Justice Powell's view, the Court "would subject all state regulation affecting adult sexual relations to the strictest standard of judicial review", a position he rejected. Id., 703. The Court disclaimed this view, arguing that it had decided only the question of the protected nature of the decision to prevent conception or terminate pregnancy; "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults". Id., 688 n. 5, 694 n. 17. Justice Rehnquist noted that while not every conceivable regulation affecting such conduct had been passed on, the facial constitutional validity of criminal statutes prohibiting consensual homosexual reations had been "defini-

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ernmental regulation of the sexual activities of minors is subject to constitutional scrutiny is of great and continuing importance.[3.8] Analysis of these questions is hampered because the Court has not told us what about the particular facets of human relationships—marriage, family, procreation—gives rise to a protected liberty and what does not and now indeed these factors vary significantly enough from other human relationships to result in differing constitutional treatment. The Court's observation in the abortion cases "that only personal rights that can be deemed 'fundamental' are included in this guarantee of personal privacy," occasioning justification by a "compelling" interest,[4.8] little elucidates the answers inasmuch as in the same Term the Court significantly restricted its equal protection doctrine of "fundamental" interests—"compelling" interests justification by holding that the "key" to discovering whether an interest or a relationship is a "fundamental" one is whether it is "explicitly or implicitly guaranteed by the Constitution." [5.8]

Whether an independent, discrete concept of privacy, in either of its major aspects, emerges from developing judicial doctrines is largely problematical. There appears to be a tendency to designate as a right of privacy a right or interest which extensions of precedent or applications of logical analysis have led the Court to conclude to protect. Because this protection is now settled to be a "liberty" which the due process clause includes, the analytical validity of denominating the particular right or interest as an element of privacy rather than as an element of "liberty" seems open to question.

**Family Relationships.**—While the "privacy" basis of autonomy seems to be definitionally based, the Court's drawing on the line of cases since *Meyer* and *Pierce* [6.8] has "established that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradi-

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tively" established, id., 718 n. 2 citing *Doe v. Commonwealth*, 425 U.S. 901 (1976). In that case, the Court summarily affirmed the upholding of a state law banning homosexual relations. See 403 F. Supp. 1199 (D.C.E.D.Va. 1975). In *Moore v. City of East Cleveland*, 431 U.S. 494, 503-506 (1977) (plurality opinion), Justice Powell argued that substantive due process protection is limited in accordance with traditional values, a standard that would deny protection to homosexual relationships.

[3.8] The Court reserved this question, 431 U.S., 694 n. 17 (plurality opinion), although Justices White, Powell, and Stevens in concurrence seemed to see no barrier to state prohibition of sexual relations by minors. Id., 702, 703, 712.

[4.8] *Roe v. Wade*, 410 U.S. 113, 152 (1973). The language is quoted in full in *Carey*, *supra*, 431 U.S. 684-685.

[5.8] *San Antonio School District v. Rodriguez*, 411 U.S. 1, 33-34 (1973). That this restriction is not holding with respect to equal protection analysis or due process analysis can be discerned easily. Compare *Zablocki v. Redhail*, 434 U.S. 374 (1978 (opinion of Court), with id., 391 (Justice Stewart concurring), and id., 396 (Justice Powell concurring).

[6.8] *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

tion."[7.5] Recognition of the protected "liberty" of the familial relationship affords the Court a principled and doctrinal basis of review of governmental regulations that adversely impact upon the ability to enter into the relationship, to maintain it, to terminate it, and to resolve conflicts within the relationship. This liberty, unlike the interest in property which has its source in statutory law, springs from the base of "'intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'"[8.5] Being of fundamental importance, the familial relationship is ordinarily subject only to regulation that can survive rigorous judicial scrutiny, although "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."[9.5] Recent decisions cast light in all areas of the family relationship.

The right to marry is a fundamental right protected by the due process clause.[10.5] Therefore, a state statute is invalid which denies the right to marry to someone under obligation to support minor children when he has failed to meet the obligation, because the law does not serve any legitimate interest which the State could assert to be compelling enough to justify it.[11.5]

There is a constitutional right to live together as a family,[12.5] one not limited to the nuclear family. Thus, a city ordinance which zoned for single family occupancy and so defined "family" as to bar extended family relationships and thereby prevented a grandmother from having in her household two grandchildren of different children was found to violate the due process clause.[13.5] And the concept of "family" may extend beyond the biological, blood relationship of extended families to the situation of foster families, although the Court has acknowledged that such a claim to constitutionally protected liberty

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[7.5] *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality).

[8.5] *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 845 (1977).

[9.5] *Zablocki* v. *Redhail*, 434 U.S. 374, 386 (1978).

[10.5] *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); *Griswold* v. *Connecticut*, 381 U.S. 479, 486 (1965); *Cleveland Bd. of Education* v. *LaFleur*, 414 U.S. 632, 639–640 (1974); *Zablocki* v. *Redhail*, 434 U.S. 374, 383–387 (1978).

[11.5] *Zablocki* v. *Redhail*, 434 U.S. 374 (1978). The majority of the Court deemed the statute to fail under equal protection, whereas Justices Stewart and Powell found the due process clause to be violated. Id., 391, 396. Compare *Califano* v. *Jobst*, 434 U.S. 47 (1977).

[12.5] "If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'" *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 862–863 (1977) (Justice Stewart concurring), cited with approval in *Quilloin* v. *Walcott*, 434 U.S. 246, 255 (1978).

[13.5] *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (plurality opinion). The fifth vote, decisive to the invalidity of the ordinance, was on other grounds. Id., 513.

interests raises complex and novel questions.[14.5] In the conflict between natural and foster families, other difficult questions inhere and it may well be that a properly constituted process under state law of determining the best interests of the child will be deferred to.[15.5]

In the nature of complex and novel questions are the varied issues turning on the possible conflicts between parental rights and children's rights, on which the Court has touched but not dealt with definitively.[16.5]

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[14.5] *Smith* v. *Organization of Foster Families*, 431 U.S. 816 (1977). The natural family, the Court observed, had its source not in statutory law whereas the ties that develop between foster parent and foster child have their origins in an arrangement which the State brought about. But some liberty interests do arise from positive law, although the expectations and entitlements are thereby limited as well by state law. And such a liberty interest may not be recognized without derogating from the substantive liberty interests of the natural parents. Thus, the interest of foster parents must be quite limited and attenuated, but *Smith* does not define what it is. Id., 842-847.

[15.5] See *Quilloin* v. *Walcott*, 434 U.S. 246 (1978).

[16.5] The clearest conflict presented to date raised the issue of giving a veto to parents over their minor children's right to have an abortion. *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976). See also *Parham* v. *J. R.*, 442 U.S. 584 (1979).

## Procedural Due Process: Civil

### [P. 1400, add to N. 8:]

But see *United States* v. *Kras*, 409 U.S. 434 (1973) (Fifth Amendment due process); *Ortwein* v. *Schwab*, 410 U.S. 656 (1973), qualifying *Boddie* in line with that in the text.

## Jurisdiction

### [P. 1420, in text following paragraph with N. 16, add:]

The "minimum contacts" standard of *International Shoe* was applied in *Kulko* v. *Superior Court*[1.5] to deny California personal jurisdiction over a New York resident whose sole contact with the State was to send his daughter to live with her mother in California.[2.5] The Court emphasized that the existence of personal jurisdiction depended upon there being a sufficient connection between the defendant and the forum State as to make it fair to require defense of the action in the forum. Rejected was the State's contention that by sending the daughter to California, Kulko had "caused an effect" in the State by availing himself of the benefits and protections of California's laws and by deriving an economic benefit in the lessened expense of main-

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[1.5] 436 U.S. 84 (1978).

[2.5] Kulko had visited the State twice, seven and six years respectively before initiation of the present action, the marriage occurring in California on the second visit, but neither the visits nor the marriage was sufficient to give the State jurisdiction. Id., 92-93.

taining the daughter in New York. The "effects" test the Court deemed to involve wrongful activity outside a State which causes injury within the State or commercial activity affecting state residents, factors not present in this case. Any economic benefit to Kulko was derived in New York and not in California.

This decision was narrowly limited to its facts and does little to clarify the standards applicable to state jurisdiction over nonresidents.

**[P. 1423, add to N. 7:]**

For an application of the "minimum contacts" test, see *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980). Plaintiffs sustained personal injuries in Oklahoma in an accident involving an automobile they had purchased the previous year in New York while they were New York residents and which they were driving through Oklahoma on their way to a new residence in another State. Defendants were the automobile retailer and its wholesaler, New York corporations that did no business in Oklahoma. The Court found no circumstances justifying assertion by Oklahoma state courts of jurisdiction over defendants. They (1) carried on no activity in Oklahoma, (2) closed no sales and performed no services there, (3) availed themselves of none of the benefits of the State's laws, (4) solicited no business there either through salespersons or through advertising reasonably calculated to reach the State, and (5) sold no cars to Oklahoma residents or indirectly served or sought to serve the Oklahoma market. The fact that it might have been foreseeable that automobiles sold by defendants would be taken to Oklahoma and that they might while there injure someone was an insufficient benchmark. See also *Rush* v. *Savchuk*, 444 U.S. 320 (1980).

**[P. 1425, in text following paragraph with N. 13, add:]**

**The Demise of Quasi-in-Rem Jurisdiction.**—In *Shaffer* v. *Heitner*,[3.5] a unanimous Court held that the conceptual foundations of *Pennoyer* v. *Neff*[4.5] were no longer adequate to support state court jurisdiction over a nonresident defendant merely because some property of his, real or intangible, may be found within the forum State; henceforth, the "minimum contacts" standards of *International Shoe*[5.5] will govern, so that a State may not exercise jurisdiction over property in order to satisfy personal claims against the property owner if the owner is not subject to its personal jurisdiction. The "central concern of the inquiry into personal jurisdiction" now becomes "the relationship among the defendant, the forum, and the litigation".[6.5] "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly adminis-

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[3.5] 433 U.S. 186 (1977). Justice Powell concurred, willing to continue to accept *in rem* jurisdiction over real property as a means of promoting certainty while protecting defendants against unfairness. Id., 217. Justice Stevens concurred in the result only, focusing on the necessity of "fair warning" of possible litigation in a particular forum, which location of property could sometimes provide. Ibid.

[4.5] 95 U.S 714 (1877).

[5.5] *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).

[6.5] *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977).

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tration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a State may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." [7.8]

Basis for application of the "minimum contacts" standards to state assertions of jurisdiction over property rests on "fair play and substantial justice". When a State asserts jurisdiction over a thing, it is proceeding against the interests of a person in the thing; "[t]his recognition leads to the conclusion that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing.' " [8.8] Of course, the existence of property within the forum State may well be sufficient to afford jurisdiction because of the nature of the action [9.8] and the existence of the property will in other instances bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. Thus, jurisdiction over many types of actions that could have been brought *in rem* would not be affected by the holding in *Shaffer*, but many cases would be altered,[10.8] necessitating a long period of adjudication in which not only

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[7.8] *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945).

[8.8] *Shaffer* v. *Heitner*, 433 U.S. 186, 207 (1977).

[9.8] The Court indicated several instances in which location of the property would be sufficient. Thus, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, the State has jurisdiction; the State would usually have jurisdiction in cases such as suits for injury suffered on the property of an absentee owner, where the defendant's ownership of the property is conceded but the cause of action is otherwise related to rights and duties growing out of that ownership. But the presence of property is not sufficient where the controversy is completely unrelated to the property. Id., 207–209.

[10.8] For example, a case which did not survive *Shaffer*, see *supra*, 433 U.S. 200–201, 206–209, and see *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 296 (1980), is *Harris* v. *Balk*, 198 U.S. 215 (1905), in which plaintiff was allowed to obtain *quasi-in-rem* jurisdiction over a debt owed to defendant by a third party when the third party briefly came into plaintiff's State. In *Rush* v. *Savchuk*, 444 U.S. 320 (1980), plaintiff was injured in a one-car accident in Indiana while a passenger in an automobile driven by defendant. Plaintiff later moved to Minnesota and sued defendant in state court there. There were no contacts between defendant and Minnesota, but defendant's insurance company did business there and plaintiff garnished the insurance contract, signed in Indiana, under which the company was obligated to defend defendant in litigation and indemnify him to the extent of the policy limits. The Court refused to permit jurisdiction to be grounded on the contract; the contacts justifying jurisdiction must be those of the defendant engaging in purposeful activity related to the forum. The Court refused to treat the action as one in reality against the insurance company directly which would have no consequences for the nominal defendant. *Rush* resulted in the demise of the controversial *Seider* v. *Roth*, 17 N.Y. 2d 111, 216 N.E. 2d 312 (1966), doctrine, which lower courts had struggled to save after *Shaffer*. E.g., *O'Connor* v. *Lee-Hy Paving Corp.*, 579 F. 2d 194 (C.A. 2), *cert. den.*, 439 U.S. 1034 (1978).

the differences in results of past cases must be worked out but substantive content be filled into the "minimum contacts" standard itself which after all these years remains vague.

**[P. 1429, add to N. 13:]**

See also *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972) (notice of forfeiture proceeding mailed to convicted defendant's home address when State knew he was incarcerated was not adequate).

**[P. 1432, at end of paragraph carried over from previous page, add:]**

The Court's due process doctrine analyzed in the text has over this period exhibited great uncertainty, undergoing simultaneously a formal expansion of those interests deemed protected and an actual definitional contraction of the determination of what interests are to be deemed protected. This seemingly paradoxical approach, or description of an approach, may be understood by a review of the decided cases.

Traditionally, the Court has accorded due process recognition to one's "life, liberty, or property" as determined by reference to common understanding. One's right to life existed independently of any formal guarantee of it and could only be taken away by the state pursuant to the formal processes of law for offenses against law deemed by a legislative body to be particularly heinous; one's liberty, one's freedom from bodily restraint, was a natural right to be forfeited only pursuant to law and strict formal procedures. One's ownership of land, chattels, and other property, to be sure, was highly dependent upon legal protections of rights commonly associated with that ownership, but it was a concept universally in Anglo-American countries understood. Expansion of the "property" concept in the 1960's occurred with respect to according protection to such public benefits as welfare assistance and other privileges that government conferred and purported to be able to revoke for any reason or for no reason at all. Key to this expansion was the abandonment of the "right-privilege" distinction in constitutional law and the formulation of an "entitlement" concept of property interests. There flowed from the entitlements concept the requirement that procedural due process must be observed before certain things were done, such as that one must be accorded some kind of hearing before welfare benefits could be taken away from one previously found to qualify for them,[1.8] before goods purchased on installments could be taken away upon allegations of nonpayment,[2.8] before a driver's license could be revoked.[3.8] The Court looked not only to formal statutory assurance of entitlement but found it also in a governmental pattern or practice which gave rise to an as-

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[1.8] *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

[2.8] *Fuentes* v. *Shevin*, 407 U.S. 67 (1972).

[3.8] *Bell* v. *Burson*, 402 U.S. 535 (1971).

surance that one is entitled to some protection against arbitrary deprivation.[4.8]

The entitlement doctrine, however, was never suggested by the Court as the sole source of the determination that especially a liberty but also a property interest was entitled to protection and indeed there were cases of protected interests, predominantly liberty interests, held protected in the absence of any positive state guarantee at all.[5.8]

During this period, the Court took these actions:

First, it continued to find "property" interests that were protected by the due process clause because they were guaranteed under state law. Thus, in *Goss* v. *Lopez*,[6.8] because Ohio included within its statutes a provision for free education to all residents between five and 21 years of age and a compulsory-attendance at school requirement, it was deemed to have obligated itself to accord students some due process hearing rights prior to suspending them, even for such a short period as ten days. "Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred."[7.8]

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[4.8] While, in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), the Court held the refusal to renew a teacher's contract upon expiration of his one-year term implicated no due process values because there was nothing in the university's contract, regulations, or policies that "created any legitimate claim" to reemployment, in *Perry* v. *Sindermann*, 408 U.S. 593 (1972), it found that "existing rules or understandings" could confer upon employee a legitimate expectation, that written contract provisions might be supplemented by other agreements implied from " 'the promisor's words and conduct in the light of surrounding circumstances' ". Id., 602. Compare *Morrissey* v. *Brewer*, 408 U.S. 471, 482 (1972) (legitimate parolee reliance upon the "implicit promise" that he may remain on parole as long as he abides by parole conditions), with *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 8–11 (1979) (that State holds out mere possibility of parole provides no more than mere hope that benefit will be obtained). *Leis* v. *Flynt*, 439 U.S. 438, 442 (1979), arguably heightens the necessary showing by requiring "a mutually explicit understanding.").

[5.8] Cf. *Morrissey* v. *Brewer*, 408 U.S. 471, 482 (1972); *Wolff* v. *McDonnell*, 418 U.S. 539, 556–557 (1974). See also *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), and the discussion in *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 845 (1977).

[6.8] 419 U.S. 565 (1975). Cf. *Bd. of Curators* v. *Horowitz*, 435 U.S. 78 (1978).

[7.8] Id., 574. Because the right to fair procedure is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertion and because of the societal importance in the observance of fair procedure, violation of the right entitles one to nominal damages in any event, but he must prove other damages actually suffered in order to receive greater compensation. *Carey* v. *Piphus*, 435 U.S. 247 (1978) (school suspension). In *Bd. of Curators* v. *Horowitz*, 435 U.S. 78 (1978), five Justices relied on the different evaluations necessitated in academic dismissals and discipline, as contrasted to disciplinary actions, to pronounce that procedural safeguards were not called for in making those judgmental exercises. Id., 84–91. Because the section was, strictly speaking, dictum, four Justices either disagreed or refused to commit themselves. Id., 96, Moreover, the Court looked to state decisional law to find that private utilities may not terminate service at will but only for cause, for nonpayment of charges, so that when there was a dispute about payment or the accuracy of charges, due process required the utility to follow procedures to resolve the dispute prior to terminating service.[8.5]

Second, the Court utilized the entitlement doctrine to replace other sources of interests deemed protected as liberty interests, so that some interests were excluded from procedural protection. Thus, in *Meachum* v. *Fano*,[9.5] the Court held that a state prisoner was not entitled to a factfinding hearing when he is transferred to a prison in which the conditions are substantially less favorable to him because (1) the due process clause is satisfied by the initial valid conviction which deprives him of his liberty and (2) no state law guaranteed him the right to remain in the prison to which he was initially assigned, subject to transfer for cause of some sort. Under state law, he could be transferred for any reason or no reason and the due process clause did not mandate a different result. The decision of prison officials was not dependent upon any state of facts that would be found upon a hearing. Exclusive utilization of the entitlement concept would substantially reduce the application of the Due Process clause to official deprivations of liberty and property interests, but subsequent cases appeared to forsake such exclusivity. In *Ingraham* v. *Wright*,[10.5] the Court, unanimously, agreed that freedom from wrongfully or excessively administered corporal punishment was a liberty interest of school children protected by the due process clause irrespective of positive state protection. "The liberty preserved from deprivation without due process included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.' . . . Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." [11.5]

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97, 108. For a similar analysis in the context of the judgment exercised in determining whether to grant parole, see *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 12–16 (1979) (a liberty interest).

[8.5] *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1 (1978). See also *Bd. of Curators* v. *Horowitz*, 435 U.S. 78, 82–84 (1978); *Dixon* v. *Love*, 431 U.S. 105 (1977). In *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980), the Court determined that the statutory entitlement of nursing home residents protecting them in the enjoyment of assistance and care in certified homes gave them no property interest to contest the government's action to decertify the home.

[9.5] 427 U.S. 215 (1976). See also *Montanye* v. *Haymes*, 427 U.S. 236 (1976). In *Vitek* v. *Jones*, 445 U.S. 480 (1980), the Court found that the statutory provisions governing transfers of persons from prisons to mental hospitals because of mental disease or defect adequately conferred a liberty interest upon prisoners. Aside from the statute, a liberty interest was also found.

[10.5] 430 U.S. 651, 672–674 (1977). See also Id., 692 (Justice White).

[11.5] Id., 673. Freedom from bodily restraint and punishment save through fair procedure is a basic liberty and analogous to criminal punishment, thus perhaps affording a basis to distinguish other liberty interests which the Court could

Third, in *Paul* v. *Davis*,[12.5] the Court looked exclusively to positive statutory enactments to determine whether an interest was entitled to protection. *Davis* involved official defamation of someone, but the Court held that damage to reputation alone did not constitute a deprivation of any interest that the due process clause protected. "Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions." [12.6] And yet in a subsequent case, the Court looked to decisional law and the existence of common-law remedies as establishing a protected interest in continued service by utilities.[12.7]

Fourth, three Justices in *Arnett* v. *Kennedy* [12.8] sought to qualify the principle laid down in the entitlement cases and to restore in effect much of the right-privilege distinction in a new formulation. Dealing with a federal law conferring upon employees the right not to be discharged except for cause, the Justices acknowledged the prior formulation that recognized that due process rights could be created through statutory grants of entitlements, but they went on to observe that the same law withheld the same procedural provisions now contended for; in other words, "the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest." [12.9] Congress could qualify its conferral of an interest the due process clause might otherwise require.

But the other six Justices, while disagreeing among each other in other respects, rejected this attempt so to formulate the issue. "This view misconceives the origin of the right to procedural due process",

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hold dependent upon the state law. This is perhaps what is meant by "nor does this case involve any state-created interest going beyond the Fourteenth Amendment's protection of freedom from bodily restraint and corporal punishment." Id., 674 n. 43. But the distinction would not take account of the liberty interest found when deprivation of a nonprotected property interest is coupled with a stigmatizing effect of governmental action. *Bishop* v. *Wood*, 426 U.S. 341, 347–350 (1976); *Codd* v. *Velger*, 429 U.S. 624, 627 (1977) (discharge from employment); *Vitek* v. *Jones*, 445 U.S. 480, 491–494 (1980) (transfer of prison inmate to mental institution). And see *Bd. of Curators* v. *Horowitz*, 435 U.S. 78, 82–84 (1978).

[12.5] 424 U.S. 693 (1976). A series of prior cases, see *Text*, p. 1430 n. 4, and *Goss* v. *Lopez*, 419 U.S. 565 (1975), seemingly finding constitutional protection for reputation were distinguished as being "reputation-plus" cases.

[12.6] *Paul* v. *Davis*, 424 U.S. 693, 711–712 (1976). An alternative explanation of *Paul* v. *Davis* is that when there is an adequate state remedy for defamation it may be that one is not deprived of due process of law merely by the state impairment of reputation, a suggestion flowing from the Court's analysis in *Ingraham* v. *Wright*, 430 U.S. 651, 676–680 (1977). See esp. id., 701–702 (Justice Stevens dissenting).

[12.7] *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 9–12 (1978).

[12.8] 416 U.S. 134 (1974) (Fifth Amendment due process).

[12.9] Id., 155 (Justices Rehnquist and Stewart and Chief Justice Burger).

Justice Powell wrote. "That right is conferred not by legislative grace but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."[17.5] Yet, in a more recent decision, *Bishop* v. *Wood*,[18.5] the dissenters accused the majority of having repudiated the position of the six Justices in *Arnett* and of having adopted Justice Rehnquist's view of the issue.[19.5] Because of the highly ambiguous majority opinion and the terms of the ordinance at issue, it cannot be concluded that the more narrow position advocated by Justice Rehnquist was adopted and a number of precedents limited; but the opinion's emphasis upon the ordinance's limited procedural guarantees and upon the state and local governmental discretion in affording or repealing or qualifying guarantees seemingly moves precedent in the direction of that advocated by the Rehnquist opinion in *Arnett*.[20.5]

Fifth, in those cases in which the Court finds protected interests, it has adopted in recent cases a balancing approach that has resulted in different and less stringent procedural guarantees being imposed.[21.5]

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[17.5] Id., 167 (Justices Powell and Blackmun concurring). See also id., 177 (Justice White concurring and dissenting), 203 (Justice Douglas dissenting), 206 (Justices Marshall, Douglas, and Brennan dissenting).

[18.5] 426 U.S. 341 (1976). The opinion, a five-to-four one, was by Justice Stevens, who had replaced Justice Douglas and was joined by Justice Powell, who had disagreed with the theory in *Arnett*.

[19.5] Id., 350, 353 n. 4 (Justice Brennan dissenting), 355 (Justices White, Brennan, Marshall, and Blackmun dissenting).

[20.5] On the one hand, Justice Stevens notes that the ordinance would bear the construction giving employees a guarantee of dismissal only upon cause, which would squarely have brought the case within *Arnett*, but the federal district judge and the court of appeals, equally divided, had adopted a construction that city employees held their position at the pleasure of the city. It is not clear, however, whether this construction flowed from an analysis that found the ordinance did not limit discharges to cause only or that found that it did specify cause only and conditioned removal on observance of certain minimal procedures found in the ordinance. If the latter construction is the one adopted and approved as adequate, and certain language points that way, id., 345, 347, then the Rehnquist *Arnett* analysis does have majority support. Consistency, however, is lacking. *Goss* v. *Lopez*, 419 U.S. 565, 573–574 (1975), states the Powell formulation in *Arnett* as the rule of the Court, whereas Justice Powell in dissent, id., 584, 586–587, comes close to adopting the Rehnquist *Arnett* formulation. Writing for the Court in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978), Justice Powell relates the principle of *Roth* and *Sindermann* as he formulated it in *Arnett*. And see id., 11 n. 11. But see *Leis* v. *Flynt*, 439 U.S. 438 (1979). In another context, Justice Stevens has written that "a majority of this Court has never adopted" Justice Rehnquist's position in *Arnett*. *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 160 n. 8 (1978) (dissenting). Finally, in *Vitek* v. *Jones*, 445 U.S. 480, 490 n. 6 (1980), the Court rejected, in a liberty context, what it described as an argument "identical" to that made in *Arnett*.

[21.5] The test was formulated in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), in the context of determining when a predeprivation hearing would be mandated or when a postdeprivation hearing would suffice. "[I]dentification of the specific

For example, the previous cases had focused upon the interests of debtors and installment buyers in not being unjustly deprived of the property in their possession and thus required predeprivation hearings.[22.3] The newer cases look to the interests of both creditors and debtors. "The reality is that both seller and buyer had current, real interests in the property, and the definition of property rights is a matter of state law. Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well." [22.4]

Thus, the *Sniadach* case, mandating a *predeprivation* hearing before wages may be garnished, is apparently to be limited to instances when wages, and perhaps certain other basic necessities, are in issue and the consequences of deprivation would be severe.[22.5] The *Fuentes* case, which extended the *Sniadach* principle to all "significant property interests" and thus mandated predeprivation hearings, has been limited, so that when government provides certain procedural protections in structuring the *ex parte* judicial determination that seizure should take place and provides for a prompt and adequate postdeprivation (but prejudgment) hearing, the due process clause is satisfied.[22.6] Using much the same approach, the Court has also decided

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dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."

[22.3] *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). The decision was four-to-three; argument had been heard prior to the time Justices Powell and Rehnquist joined the Court but the decision was issued after they became Justices. See *North Georgia Finishing* v. *Di-Chem*, 419 U.S. 601, 616–619 (1975) (Justice Blackmun dissenting).

[22.4] *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 604 (1975). See also id., 623 (Justice Powell concurring), 629 (Justices Stewart, Douglas, and Marshall dissenting). Justice White, who wrote *Mitchell* and included the balancing language in his dissent in *Fuentes* v. *Shevin*, 407 U.S. 67, 99–100 (1972), did not repeat it in *North Georgia Finishing* v. *Di-Chem*, 419 U.S. 601 (1975), but it presumably underlies the reconciliation of *Fuentes* and *Mitchell* in the latter case and the application of *Di-Chem*.

[22.5] See *North Georgia Finishing* v. *Di-Chem*, 419 U.S. 601, 611 n. 2 (1975) (Justice Powell concurring). The majority opinion draws no express distinction, see id., 605–606, rather emphasizing that *Sniadach-Fuentes* do require observance of *some* due process procedural guarantees, but see *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 614 (1974) (opinion by Justice White emphasizing the wages aspect).

[22.6] *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974); *North Georgia Finishing* v. *Di-Chem*, 419 U.S. 601 (1975). To be valid, the law must require, as a precondition to invoking state aid to sequester, garnish, or otherwise seize property of an alleged defaulting debtor, (1) that the creditor furnish adequate security to protect the debtor's interest, (2) that the creditor make a specific factual showing before a neutral officer or magistrate, and not a clerk or other that pretermination hearings are not required prior to the dismissal of a federal employee [1.5] or prior to the time Social Security benefits are cut off.[2.5] But application of the balancing test requires utility companies to provide customers the opportunity to present to a designated employee with the power to act a complaint that they are being overcharged or charged for services not rendered prior to the cutting off of service.[3.5]

Sixth, the Court in utilizing the balancing test in one instance decided that neither a pre- nor a posttermination hearing was necessary to satisfy due process. Passing on the infliction of corporal punishment in the schools, a practice which implicated protected liberty interests, it was held that the existence of common-law tort remedies for wrongful or excessive administration of punishment plus the context in which it was administered, that is, the ability of the teacher to observe directly the infraction in question, the openness of the school environment, the visibility of the confrontation to other students and faculty, and the likelihood of parental reaction to unreasonableness in punishment, made reasonably assured the unlikelihood that a child would be punished without cause or excessively.[4.5] Inasmuch as state tort remedies are generally available for much if not all of the wrongs that the procedures mandated by the due process clause are designed to avoid, recurrence of the analysis of this case could severely limit the

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such functionary, of probable cause to believe that he is entitled to the relief requested, and (3) that an opportunity for an adversary hearing must be assured promptly after seizure to determine the merits of the controversy, with the burden of proof on the creditor. *Mitchell*, *supra*, 615–618, and id., 625 (Justice Powell concurring). It may also be that summary action must be so structured as to minimize the possibilities of a mistaken deprivation, as, for example, in the nature of the claim of entitlement. Id., 617–618. And see *Arnett* v. *Kennedy*, 416 U.S. 134, 188 (1974) (Justice White concurring and dissenting). It should be noted that the Justices are divided into three groups on the question when the hearing should take place, based on *Fuentes*, *Mitchell*, and *Di-Chem*. Justices Brennan, Stewart, and Marshall believe preseizure hearings are mandated; Chief Justice Burger and Justices Blackmun and Rehnquist do not believe the due process clause is applicable to determine when and whether a hearing takes place; Justices White and Powell believe, with some differences of emphasis between them, that prompt postseizure hearings satisfy due process. On Justice Stevens, see *Ingraham* v. *Wright*, 430 U.S. 651, 700 (1977) (dissenting).

[1.5] *Arnett* v. *Kennedy*, 416 U.S. 134 (1974) (Fifth Amendment).

[2.5] *Mathews* v. *Eldridge*, 424 U.S. 319 (1976) (Fifth Amendment). In *Dixon* v. *Love*, 431 U.S. 105 (1977), it was held that when suspension of drivers' licenses was automatic upon conviction of a certain number of offenses, no hearing was required because there was no dispute about the facts.

[3.5] *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 16–19 (1978). The company was also obligated to inform customers of their rights to contest proposed terminations in easily understood language. Id., 13–15. Justices Stevens and Rehnquist and Chief Justice Burger thought the company's procedures to be entirely adequate. Id., 22.

[4.5] *Ingraham* v. *Wright*, 430 U.S. 651, 680–682 (1977). Justices White, Brennan, Marshall, and Stevens dissented. Id., 683, 692 application of the clause to insure reasonable hearings. The effect of such an approach would be increased in terms of possible deprivations of interests if the Court did not, as it did not in *Ingraham*, inquire into the availability of judicial remedies in the States for the violations likely to occur.[5.8]

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[5.8] Id., 693-696 (Justice White dissenting). In *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19-22 (1978), the Court rejected the argument that common-law remedies were sufficient to obviate the hearing requirement, on the basis that they could not remedy the particular deprivation and on their inadequacy in any event.

**[P. 1435, in text following N. 12, add:]**

Building upon the analysis of *Stanley*, the Court during this period created the doctrine of irrebutable (or conclusive) presumptions and then sharply reined in the doctrine so as to limit its effect. The doctrine requires that when the legislature confers a benefit or imposes a detriment depending for its application upon the establishment of certain characteristics the legislature may not irrebutably presume the existence of the characteristics upon a given set of facts to disqualify someone from the benefit or to subject someone to the detriment, unless it can be shown that the defined characteristics do in fact encompass all persons and only those persons that it was the purpose of the legislature to reach. Thus, while a State may require that nonresidents must pay higher tuition charges at state colleges than residents, and while the Court assumed that a durational residency requirement would be permissible as a prerequisite to a new resident to qualify for the lower tuition, it was impermissible for the State to presume conclusively that because the legal address of a student was outside the State at the time of application or at some point during the preceding year he was a nonresident as long as he remained a student; the due process clause requires that the student be afforded the opportunity to show that he is or has become a *bona fide* resident entitled to the lower tuition.[1.8] A food stamp program provision making ineligible any household that contained a member age 18 or over who was claimed as a dependent for federal income tax purposes the prior tax year by a person not himself eligible for stamps was voided on the ground that it created a conclusive presumption that fairly often could be shown to be false if evidence could be presented.[2.8] Mandatory maternity leave rules of school boards requir-

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[1.8] *Vlandis v. Kline*, 412 U.S. 441 (1973). Joining Justice Stewart's opinion were Justices Brennan, Marshall, Blackmun, and Powell. Justice White concurred on equal protection grounds. Id., 456. Chief Justice Burger and Justices Rehnquist and Douglas dissented, arguing that the Court's opinion incorporated equal protection "strict scrutiny" into due process litigation, Id., 459, and that the Court was really calling up substantive due process again. Id., 463.

[2.8] *Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973) (Fifth Amendment). Joining Justice Douglas' opinion were Justices Brennan, Stewart, White, and Marshall. Justice Blackmun dissented because he would have interpreted the

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ing pregnant teachers to take unpaid maternity leave five and four months respectively prior to the date of the expected births of their babies were held to create a conclusive presumption that every pregnant teacher who reaches a particular point of pregnancy becomes physically incapable of continuing and were therefore voided.[3.5] The irrebutable presumption approach to certain classifications afforded the Court an opportunity to choose between resort to the equal protection clause or to the due process clause in judging their validity; the Court's decisions, however, did not permit a principled determination of the standards utilized by the Justices in deciding whether to judge a classification by one or the other analysis.[4.5] Utilization of the doctrine was curbed in *Weinberger* v. *Salfi*,[5.5] in which the Court approved but distinguished the prior cases in the line [6.5] and imported traditional equal protection analysis into consideration of due process challenges to statutory classification.[7.5] "[E]xtensions" of the prior cases to governmental entitlement classifications, such as the Social Security Act qualification standard at issue in *Salfi*, would, said the Court, "turn the doctrine of those cases into a virtual engine of destruction for countless legislative judgements which have heretofore been thought wholly consistent with the Fifth and Fourteenth Amendments to the Constitution." [8.5] Presumably, the Court will now

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statute to avoid the constitutional problem. Id., 580. Justice Rehnquist and Powell and Chief Justice Burger dissented, rejecting the irrebutable presumption analysis. Id., 582.

[3.5] *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974). Joining Justice Stewart's opinion were Justices Brennan, White, Marshall, and Blackmun. Justice Douglas concurred in the result only. Justice Powell rejected the doctrine but concurred on equal protection grounds. Id., 651. Justice Rehnquist and Chief Justice Burger dissented. Id., 657.

[4.5] Thus, on the same day *Murry* was decided, *Dept. of Agriculture* v. *Moreno*, 413 U.S. 528 (Fifth Amendment), held an invalid denial of equal protection a companion provision of the food stamp law disqualifying any household containing an individual who was unrelated to any other household member. It would appear that each case could have been decided under the doctrinal analysis of the other.

[5.5] 422 U.S. 749 (1975). The opinion, by Justice Rehnquist was dissented from by Justices Douglas, Brennan, and Marshall. Id., 785. 786. Sustained was a Social Security Act provision limiting eligibility for benefits as a deceased spouse to those persons who were married to insured decedents at least nine months before their deaths. The object of course was to disqualify those persons entering into marital relationships solely to become eligible for benefits upon the expected death of the insured.

[6.5] *Stanley* and *LaFleur* were distinguished as involving fundamental rights of family and childbearing. Id., 771, and *Murry* was distinguished as involving an irrational classification. Id., 772. Justice Rehnquist thought that the holding in *Vlandis* was no more than that when a State fixes residency as the qualification it may not deny to one meeting the test of residency the opportunity to so establish it. Id., 771. But see Id., 802–803 (Justice Brennan, dissenting).

[7.5] Id., 768–770, 775–777, 785 (utilizing *Dandridge* v. *Williams*, 397 U.S. 471 (1970), *Richardson* v. *Belcher*, 404 U.S. 78 (1971), and similar cases).

[8.5] *Weinberger* v. *Salfi*, 422 U.S. 749, 772 (1975).

limit the doctrine to those areas which involve fundamental rights or suspect classifications that would in equal protection analysis give rise to strict, and perhaps intermediate, scrutiny. Some of the cases approved but distinguished, however, do not come within those boundaries;[9.5] thus, further clarification must be awaited in future decision.[10.5]

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[9.5] *E.g.*, *Vlandis*, which involved a presumption of the same order as *Salfi*, and *Murry*, which likewise involved a qualification for a governmental benefit program.

[10.5] The only subsequent decision applying the doctrine affords no clarification, relying on *LaFleur* to strike down a statute making pregnant women ineligible for unemployment compensation for a period extending from 12 weeks before the expected birth until six weeks after childbirth. *Turner* v. *Dept. of Employment Security*, 423 U.S. 44 (1975).

**[P. 1426, add to N. 12:]**

And see *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

**[P. 1427, add to N. 2:]**

See also *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972).

**[P. 1427, add to N. 8:]**

This principle has been greatly qualified. See *supra*, p. [illegible].

**[P. 1428, in text following N. 14, add:]**

Without more, it is not a violation of due process to combine the investigating and adjudicating functions in the same agency. Agreeing that the question of combination of functions was a substantial one in administrative law,[1.5] the Court nonetheless thought that the "presumption of honesty and integrity in those serving as adjudicators"[2.5] precluded a simple rule in the matter and necessitated a showing of bias or strong implications of bias. This showing was deemed made in a case in which the state optometry board, which was made up only of private practitioners, was proceeding against other licensed optometrists for unprofessional conduct because they were employed by corporations. Since success in the Board's effort would redound to the personal benefit of private practitioners, the Court deemed the interest of the Board members to be sufficient to disqualify them.[3.5] However, the Court held that school board members did not have such an official or personal stake in the decision as to disqualify them from making the decision whether to fire teachers who had engaged in a strike against the school system in violation of state law.[4.5]

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[1.5] *Withrow* v. *Larkin*, 421 U.S. 35, 51 (1975).

[2.5] *Id.*, 47.

[3.5] *Gibson* v. *Berryhill*, 411 U.S. 564 (1973).

[4.5] *Hortonville Joint School District* v. *Hortonville Educ. Assn.*, 426 U.S. 482 (1976). Compare *Arnett* v. *Kennedy*, 416 U.S. 134, 170 n. 5 (1974) (Justice Powell), with *id.*, 196-199 (Justice White), and 216 (Justice Marshall).

## Procedural Due Process: Criminal

**[P. 1440, add to N. 4:]**

Note the recurrence to due process reasoning, as distinct from reliance on more specific Bill of Rights provisions, in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Wardius* v. *Oregon*, 412 U.S. 470 (1973); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); *Estelle* v. *Williams*, 425 U.S. 501 (1976); *Henderson* v. *Kibbe*, 431 U.S. 145 (1977); *Patterson* v. *New York*, 432 U.S. 197 (1977); *Taylor* v. *Kentucky*, 436 U.S. 478 (1978); *Kentucky* v. *Whorton*, 441 U.S. 786 (1979); *Sandstrom* v. *Montana*, 442 U.S. 510 (1979); *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980).

**[P. 1441, add to N. 4:]**

See *Smith* v. *Goguen*, 415 U.S. 566 (1974).

**[P. 1444, prior to section entitled Initiation of the Prosecution, add:]**

**Criminal Identification Process.**—The conduct by police of identification processes seeking to identify the perpetrators of crimes—by lineups, showups, photographic displays, and the like—can raise due process problems. For postindictment lineups and showups conducted before June 12, 1967,[1.5] for preindictment lineups and showups,[2.5] and for identification processes at which the defendant is not present,[3.5] the question with regard to the admissibility of an in-court identification or of testimony with regard to an out-of-court identification is whether there is "a very substantial likelihood of misidentification" and that question must be determined "on the totality of the circumstances."[4.5]

"Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous."[5.5] But, balancing the factors that it thought furnished the guidance for decision, the Court declined to lay down a *per se* rule of exclusion of an identification because it was obtained under conditions of unnecessary suggestiveness alone, feeling that the fairness standard of due process does not require an evidentiary rule of such severity.[6.5]

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[1.5] *Stovall* v. *Denno*, 388 U.S. 293 (1967). See *Text, pp. 1224–1226.*

[2.5] *Kirby* v. *Illinois*, 406 U.S. 682 (1972).

[3.5] *United States* v. *Ash*, 413 U.S. 300 (1973) (Fifth Amendment).

[4.5] *Neil* v. *Biggers*, 409 U.S. 188, 196–201 (1972); *Manson* v. *Brathwaite*, 432 U.S. 98, 114–117 (1977). The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the suspect at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the suspect, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. See also *Stovall* v. *Denno*, 388 U.S. 293 (1967); *Simmons* v. *United States*, 390 U.S. 377 (1968); *Foster* v. *California*, 394 U.S. 440 (1969); *Coleman* v. *Alabama*, 399 U.S. 1 (1970).

[5.5] *Neil* v. *Biggers*, 409 U.S. 188, 198 (1972).

[6.5] *Manson* v. *Brathwaite*, 432 U.S. 98, 107–114 (1977). The evaluative factors were what the *per se* rule and the less strict rule contributed to excluding unreliable eyewitness testimony from jury consideration, to deterrence of suggestive procedures, and to the administration of justice. The possibility of a *per se* rule in post-*Stovall* cases had been left open in *Neil* v. *Biggers*, 409 U.S. 188, 199 (1972).

[P. 1445, following N. 1 in text, add:]

It is permissible for the State to require a defendant to give pretrial notice of an intention to rely on an alibi defense and to furnish the names of supporting witnesses, but due process requires reciprocal discovery in this respect if the State so requires, necessitating that the State give defendant pretrial notice of its rebuttal evidence on the alibi issue.[1.1] Due process is violated when the accused is compelled to stand trial before a jury while dressed in identifiable prison clothes because of the possible impairment of the presumption of innocence in the minds of the jurors.[1.2] Ordinary evidentiary rules of criminal trials may in some instances deny a defendant due process. Thus, the combination in a trial of two rules (1) that denied defendant the right to cross-examine his own witness, whom he had called because the prosecution would not, in order to elicit evidence exculpatory to defendant and (2) that denied defendant the right to introduce the testimony of witnesses about matters told them out of court on the ground the testimony would be hearsay, under all the circumstances, denied defendant his constitutional right to present his own defense in a meaningful way.[1.3] Even though the burden on defendant is heavy to show that an erroneous instruction or the failure to give a requested instruction tainted his conviction, under some circumstances it is a violation of due process and reversible error to fail to instruct the jury that the defendant is entitled to a presumption of innocence.[1.4] It does not deny a defendant due process to subject him initially to trial before a nonlawyer police court judge when there is a later trial *de novo* available under the State's court system.[1.5]

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[1.1] *Wardius* v. *Oregon*, 412 U.S. 470 (1973).

[1.2] *Estelle* v. *Williams*, 425 U.S. 501 (1976). The convicted defendant was denied *habeas* relief, however, because of failure to object at trial.

[1.3] *Chambers* v. *Mississippi*, 410 U.S. 284 (1973). See also *Davis* v. *Alaska*, 415 U.S. 308 (1974) (refusal to permit defendant to examine prosecution witness about his adjudication as juvenile delinquent and status on probation at time, in order to show possible bias, was due process violation, although general principle of protecting anonymity of juvenile offenders was valid).

[1.4] *Taylor* v. *Kentucky*, 436 U.S. 478 (1978). However, an instruction on the presumption of innocence need not be given in every case, *Kentucky* v. *Whorton*, 441 U.S. 786 (1979), the Court reiterating that the totality of the circumstances must be looked to in order to determine if failure to so instruct denied due process. The circumstances emphasized in *Taylor* included the skeletal instruction on burden of proof combined with the prosecutor's remarks in his opening and closing statements inviting jury to consider defendant's prior record and his indictment in present case as indicating guilt. See also *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) (instructing jury trying person charged with "purposely or knowingly" causing victim's death that "law presumes that a person intends the ordinary consequences of his voluntary acts" denied due process because jury could have treated the presumption as conclusive or as shifting burden of persuasion and in either event State would not have carried its burden of proving guilt). And see *Cupp* v. *Naughten*, 414 U.S. 141 (1973); *Henderson* v. *Kibbe*, 431 U.S. 145, 154–155 (1977).

[1.5] *North* v. *Russell*, 427 U.S. 328 (1976).

**[P. 1445, add to N. 2:]**

*Tumey* was extended slightly in *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972).

**[P. 1445, in N. 3 following citation to Johnson v. Mississippi, add:]**

*Taylor* v. *Hayes*, 418 U.S. 488 (1974).

**[P. 1446, add to N. 9:]**

A guilty plea will waive challenges to alleged unconstitutional acts occurring prior to the plea, unless the convicted defendant can show that his plea on the advice of counsel resulted from advice that it was incompetent for the attorney to give. *Tollett* v. *Henderson*, 411 U.S. 258 (1973); *Davis* v. *United States*, 411 U.S. 233 (1973) (Fifth Amendment). But see *Blackledge* v. *Perry*, 417 U.S. 21 (1974). But if a State permits a guilty plea with a reservation of the right to appeal with respect to certain matters, such as claims of illegal searches and seizures, federal courts may entertain petitions for *habeas*, notwithstanding the guilty plea. *Lefkowitz* v. *Newsome*, 420 U.S. 283 (1975) (a 5-to-4 decision).

**[P. 1446, following N. 9 in text, add:]**

The guilty plea and the often concomitant plea bargain are important and necessary components of the criminal justice system,[1.5] and it is not impermissible for a prosecutor during such plea bargains to put a defendant to a hard choice, requiring him to forego his right to go to trial in return for escaping what is likely to be a much more severe penalty if he does elect to go to trial.[2.5]

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[1.5] *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977).

[2.5] *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978). Charged with forgery, Hayes was informed during plea negotiations that if he would plead guilty the prosecutor would recommend a five-year sentence; if he did not plead guilty, the prosecutor would also seek an indictment under the habitual criminal statute under which Hayes would receive a mandatory life sentence if convicted because of two prior felony convictions. Hayes refused to plead, was reindicted, and upon conviction was sentenced to life. Four Justices dissented, id., 365, 368, contending that the Court had watered down *North Carolina* v. *Pearce*, 395 U.S. 711 (1969).

**[P. 1446, add to N. 10:]**

Although the plea proceeding record imposes a formidable barrier to collateral attack on a guilty plea, the Court holds that federal courts on *habeas* should not exclude the possibility that a defendant's statements upon entering a plea may be the product of misunderstanding, duress, or misrepresentation and should inquire upon credible allegations. *Blackledge* v. *Allison*, 431 U.S. 63 (1977). In *Henderson* v. *Morgan*, 426 U.S. 637 (1976), the Court held that a defendant charged with first degree murder who elected to plead guilty to second degree murder had not voluntarily, in the constitutional sense, entered the plea because neither his counsel nor the trial judge had informed him that an intent to cause the death of the victim was an essential element of guilt in the second degree and therefore no showing was made that he knowingly was admitting such intent. "A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving . . . or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt." Id., 645 n. 13.

**[P. 1448, add to N. 17:]**

But see *Donnelly* v. *DeChristoforo*, 416 U.S. 637 (1974). It should be noted that though a conviction may be set aside because of a prosecutor's unconstitutional actions the prosecutor himself enjoys an absolute immunity from suit for damages in the federal courts, the Supreme Court deeming the common law immunity, construed to be so broad, to have been imported into federal law by Congress. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976).

**[P. 1449, at end of paragraph with N. 20, add:]**

In *United States* v. *Agurs*,[1.5] the Court summarized and somewhat expanded the prosecutor's obligation to disclose to the defense exculpatory evidence in his possession, even in the absence of a request, or upon a general request, by defendant. The obligation is expressed in a tripartite test of materiality of the exculpatory evidence in the context of the trial record. First, if the prosecutor knew or should have known that testimony given to the trial was perjured, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.[2.5] Second, if the defense specifically requested certain evidence and the prosecutor withheld it, the conviction must be set aside if the suppressed evidence might have affected the outcome of the trial.[3.5] Third, and the new law created in *Agurs*, if the defense did not make a request at all, or simply asked for "all *Brady* material" or for "anything exculpatory," a duty resides in the prosecution to reveal to the defense obviously exculpatory evidence and if he does not reveal it, reversal of a conviction may be required but only if the undisclosed evidence creates a reasonable doubt as to the defendant's guilt.[4.5]

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[1.5] 427 U.S. 97 (1976) (Fifth Amendment).

[2.5] Id., 103–104. This situation is the *Mooney* v. *Holohan* type of case.

[3.5] Id., 104–106. This is the *Brady* situation.

[4.5] Id., 106–114. This was the *Agurs* fact situation.

**[P. 1449, add to N. 21:]**

*Accord: Estelle* v. *Williams*, 425 U.S. 501 (1976); *Henderson* v. *Kibbe*, 431 U.S. 145, 153 (1977); *Ulster County Court* v. *Allen*, 44[illegible] U.S. 140, 156 (1979); *Sandstrom* v. *Montana*, 442 U.S. 510, 520–524 (1979); *Jackson* v. *Virginia*, 443 U.S. 307 (1979). For a discussion of the interrelated concepts of the burden on the prosecution of proving guilt beyond a reasonable doubt and the defendant's entitlement to a presumption of innocence, see *Taylor* v. *Kentucky*, 436 U.S. 478, 483–486 (1978), and compare *Kentucky* v. *Whorton*, 441 U.S. 786 (1979). The presumption is a trial doctrine governing the allocation of the burden of proof and does not afford a basis for asserting nontrial rights. *Bell* v. *Wolfish*, 441 U.S. 520, 533 (1979).

**[P. 1449, in text following N. 21, add:]**

Inasmuch as due process requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged, it was a denial of this constitutional guarantee to require a defendant charged with murder to prove that he acted "in the heat of passion on sudden provocation" in order to reduce the homocide to manslaughter.[1.6] The Court indicated that a balancing of interests test was to be employed to determine when the due process clause required the prosecution to carry the burden and when some part of the burden might be shifted to defendant, but the decision called into question the practice in many States under which some burdens of persuasion were borne by the defense and raised the prospect that the prosecution must bear all burdens of persuasion, a significant and weighty task given the large numbers of affirmative defenses. But the Court soon summarily rejected the argument that the decision meant the prosecution had to negate the insanity defense[2.6] and in full-scale consideration upheld a state statute that provided that an intentional killing is murder but permitted the defendant to assert "extreme emotional disturbance" as an affirmative defense which, if proved by the defense by a preponderance of the evidence would reduce the murder offense to manslaughter.[3.6] According to the Court, the constitutional deficiency in the earlier case was that the statute made malice an element of the offense but permitted malice to be presumed upon proof of the other elements and required the defendant to prove the absence of malice; in the present case, the statute provides that the death, the intent to kill, and the causation are the elements of the offense and the State is obligated to prove each of the elements beyond a reasonable doubt. But the statute permits the defendant to present an affirmative defense of acting under an extreme emotional disturbance as to which he bears the burden of persuasion by a preponderance and which would reduce the degree of the offense. Thus, the statute in the present case requires the prosecution to prove each of the elements defined to make up the offense whereas the law in the former case did not so require the prosecution to prove each element. So defined, the distinction and the constitutional mandate are formalistic and the legislature can shift burdens of persuasion between prosecution and defense easily through the statutory definitions of the offenses.[4.6]

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[1.6] *Mullaney v. Wilbur*, 421 U.S. 684 (1975). See also *Sandstrom v. Montana*, 442 U.S. 510, 520-524 (1979).

[2.6] Justice Rehnquist and Chief Justice Burger had argued in *Mullaney v. Wilbur*, 421 U.S. 684, 704, 705 (1975) (concurring), that the case did not require any reconsideration of the holding in *Leland v. Oregon*, 343 U.S. 790 (1952), that the defense may be required to prove insanity beyond a reasonable doubt. In *Rivera v. Delaware*, 429 U.S. 877 (1976), the Court dismissed as not presenting a substantial federal question an appeal from a holding that *Mullaney* did not prevent a State from placing on the defendant the burden of proving insanity by a preponderance of the evidence. See *Patterson v. New York*, 432 U.S. 197, 202-205 (1977) (explaining the import of *Rivera*).

[3.6] *Patterson v. New York*, 432 U.S. 197 (1977).

[4.6] Dissenting, Justice Powell argued that the two statutes were functional equivalents that should be treated alike constitutionally. He would hold that as to those facts which historically have made a substantial difference in the punishment and stigma flowing from a criminal act the State always bears the burden of persuasion but that new affirmative defenses may be created and the burden of establishing them placed on the defendant. *Id.*, 216.

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**[P. 1449, in text following N. 22, add:]**

*Winship* was determined in *Jackson* v. *Virginia*[1.5] to necessitate a new role for federal court review, on direct appeal or collateral attack, of state court criminal convictions. It is "an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Thus, the federal court must satisfy itself whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt; the question the court is to ask itself is not whether *it* believes the evidence at the trial established guilt beyond a reasonable doubt, but whether, after viewing the evidence in the light most favorable to the prosecution, *any rational* trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[2.5]

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[1.5] 443 U.S. 307 (1979).

[2.5] Id., 316, 318–319.

**[P. 1449 add to N. 23:]**

For an extensive discussion of presumptions, mandatory and permissive, see *Ulster County Court* v. *Allen*, 442 U.S. 140 (1979), a five-to-four opinion. The case upheld, on the facts of the case, a statutory presumption that the presence in an automobile of, *inter alia*, any firearm was evidence of its possession by all persons occupying the automobile. The Court found, on the facts, that the presumption of possession was entirely rational.

**[P. 1449, add to N. 24:]**

In *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980), the jury had been charged in accordance with an habitual offender statute that if it found defendant guilty of the offense charged, which would be a third felony conviction, it should assess punishment at 40 years imprisonment. The jury convicted and gave defendant 40 years. Subsequently, in another case, the provision of the habitual offender statute under which Hicks had been sentenced was declared unconstitutional but his conviction was affirmed on the basis that his sentence was within the permissible range open to the jury in any event. The Supreme Court reversed. Hicks was denied due process because he was statutorily entitled to the exercise of the jury's discretion and could have been given a sentence as low as ten years. That the jury might have still given the stiffer sentence was only conjectural and he was entitled to sentencing by a body under proper constitutional instruction.

**[P. 1450, add to N. 25:]**

In capital cases, the Court has now, although by no consistent rationale, limited *Williams* v. *New York*. In *Gardner* v. *Florida*, 430 U.S. 349 (1977), the jury had recommended a life sentence upon convicting defendant of murder, but the trial judge, on the basis of a confidential presentence report which he did not characterize nor make available to defense or prosecution as well as on the basis of evidence adduced at trial, sentenced defendant to death. Three Justices in an opinion found that because capital punishment was significantly different from other punishments and because sentencing procedures were subject to due process standards to a higher degree than when *Williams* was decided, the report must at least be made part of the record for review so that the factors motivating imposition of the death penalty may be known and ordinarily must be made available to the defense. All but one of the other Justices joined the result on various other bases. On the other hand, in *United States* v. *Grayson*, 438 U.S. 41 (1978) (Fifth Amendment), the Court relied heavily on *Williams* in holding that a sentencing judge may consider his belief that the defendant was untruthful in his trial testimony in reaching his sentencing decision. Under the current scheme of individualized indeterminate sentencing, the judge must be free to consider the broadest range of information in assessing the defendant's prospects for rehabilitation and defendant's truthfulness, as assessed by the trial judge from his own observations, is relevant information.

**[P. 1451, add to N. 4:]**

*Pearce* was held to be nonretroactive in *Michigan* v. *Payne*, 412 U.S. 47 (1973).

**[P. 1451, following N. 4 in text, add:]**

Because the possibility of vindictiveness in resentencing is *de minimis* when it is the jury which sentences, *Pearce's* requirement that a judge resentencing on a subsequent trial must justify a more severe sentence is inapplicable to jury sentencing, at least in the absence of a showing that the jury knew of the prior vacated sentence. The Court concluded the possibility of vindictiveness was so low because normally the jury would not know of the result of the prior trial nor the sentence imposed, nor would it feel either the personal or institutional interests of judges leading to efforts to discourage the seeking of new trials.[1.5] However, the *Pearce* rationale was applied to preclude a prosecutor from charging with a higher offense a defendant convicted of a lesser charged offense in an inferior court when the defendant sought and obtained a trial *de novo* in a higher court. The possibility that a prosecutor might charge an offender with a more serious offense in order to penalize an exercise of the right of appeal or to deter the exercise of the right presented "a realistic likelihood of 'vindictiveness.' "[2.5]

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[1.5] *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973). Justices Stewart, Brennan, and Marshall thought the principle was applicable to jury sentencing and that prophylactic limitations appropriate to the problem should be developed. Id., 35, 38. Justice Douglas dissented on other grounds. Id., 35.

[2.5] *Blackledge* v. *Perry*, 417 U.S. 21 (1974). Justice Rehnquist dissented. Id., 32.

**[P. 1451, add to N. 6:]**

Note that the necessary effect of the prevailing plurality opinion in the new capital punishment cases is to adopt the standards-bifurcated trial requirements rejected in *McGautha* as a due process mandate rather than an Eighth Amendment mandate. *Supra*, p. *S192*.

### [P. 1451, add to N. 8:]

See *Drope* v. *Missouri*, 420 U.S. 162 (1975), in which the Court explored the circumstances when a trial court should inquire into the mental competency of the defendant to stand trial.

### [P. 1452, add to N. 13:]

*Ross* v. *Moffitt*, 417 U.S. 600 (1974), makes the same point.

### [P. 1454, add to N. 23:]

But see *Stone* v. *Powell*, 428 U.S. 465 (1976), *supra* pp. *S53, S157*.

### [P. 1455, add to N. 3:]

See also *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974); *Wolff* v. *McDonnell*, 418 U.S. 539, 555–556 (1974); *Meachum* v. *Fano*, 427 U.S. 215, 225 (1976); *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119, 129 (1977); *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979) (Fifth Amendment). Persons not yet convicted of a crime may be detained by government upon the appropriate determination of probable cause and the detention may be effectuated through subjection of the prisoner to the restrictions and conditions of the detention facility. But a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. Therefore, unconvicted detainees may not be subjected to conditions and restrictions that amount to punishment. Id., 535–540.

Although the Court has had little opportunity, but see *Hutto* v. *Finney*, 437 U.S. 678 (1978), to review the great amount of lower federal court handling of litigation over state prison conditions, e.g., *Newman* v. *Alabama*, 559 F. 2d 283 (C.A. 5, 1977), *cert. den.*, 438 U.S. 915 (1978), it has emphasized the restraint it wishes lower federal courts to exercise and the deference it expects to be given to the expertise of prison officials. *Bell* v. *Wolfish*, 441 U.S. 520, 545–548, 551, 555, 562 (1979) (Fifth Amendment; federal prison).

### [P.1455, add to N. 4:]

Further extending this line of cases, the Court held that the States must provide prisoners with reasonable access to a law library or to persons trained in the law. *Bounds* v. *Smith*, 430 U.S. 817 (1978).

### [P. 1455, following first full paragraph on page, add:]

In *Wolff* v. *McDonnell*,[2.2] the Court promulgated due process standards to govern the imposition of discipline upon prisoners. "Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, . . . . But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime."[2.3] Due process applies, but since prison disciplinary proceedings are not part of a criminal prosecution the full panoply of rights of a defendant are not available. Rather, the analysis must proceed on a basis of identifying the interest in "liberty" which the clause protects.

Where the state provides for good-time credit or other privileges and further provides for forfeiture of these privileges only for serious

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[2.2] 418 U.S. 539 (1974).

[2.3] Id., 555.

misconduct, the interest of the prisoner in this degree of "liberty" entitles him to those minimum procedures appropriate under the circumstances.[63] What the minimum procedures consist of is to be determined by balancing the prisoner's interest against the valid interest of the prison in maintaining security and order in the institution, in protecting guards and prisoners against retaliation by other prisoners, and in reducing prison tensions. Therefore, the prison must afford the subject of a disciplinary proceeding advance written notice of the claimed violation and a written statement of the factfindings as to the evidence relied upon and the reasons for the action taken; the inmate should be allowed to call witnesses and present documentary evidence in defense when permitting him to do so will not hazard the institution's interests. Confrontation and cross-examination of adverse witnesses is not required inasmuch as these would no doubt hazard valid institutional interests. Ordinarily, an inmate has no right to representation by retained or appointed counsel. Limitations imposed on the discretion of the body conducting the proceedings met the impartial tribunal requirements.[64]

Determination whether due process requires a hearing before a prisoner is transferred from one institution to another requires a close analysis of the applicable statutes and regulations as well as a consideration of the particular harm suffered by the transferee. On the one hand, the Court found that no hearing need be held prior to the transfer of one from a prison to another prison in which the conditions were substantially less favorable to him than the one he is in. Since the State had not conferred any right to remain in the facility to which he is first assigned, defeasible upon the commission of acts for which transfer is a punishment, prison officials had unfettered discretion to transfer any prisoner for any reason or for no reason at all; consequently, there was nothing to hold a hearing about.[65] On the other hand, transfer of a prisoner to a mental hospital pursuant to a statute authorizing it if the inmate suffers from a "mental disease or defect" must be preceded by a hearing for two alternate reasons: first, the statute gave the inmate a liberty interest since it presumed he would not be moved absent a finding he was suffering from a mental disease or defect, and, second, unlike transfers from one prison to another, a transfer to a mental institution was not within the range of confinement that a sentence subjected a convicted person to and the stigmatizing consequence of a transfer to a mental hospital was a deprivation of a liberty interest to which due process imposed procedural guarantees.[6.5]

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[63] Id., 557. This analysis, of course, tracks the property interest analysis discussed *supra*, pp. S228–S230.

[64] Id., 418 U.S., 561–572. The Court continues to adhere to its refusal to require appointment of counsel. *Vitek* v. *Jones*, 445 U.S. 480, 496–497 (1980), and id., 497–500 (Justice Powell concurring); *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976).

[65] *Meachum* v. *Fano*, 427 U.S. 215 (1976); *Montanye* v. *Haymes*, 427 U.S. 236 (1976).

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[6.5] *Vitek v. Jones*, 445 U.S. 480 (1980).

[P. 1457, following N. 16 in text, add:]

The Court has now applied a flexible due process standard in regard to the provision of counsel. Counsel is not invariably required in parole or probation revocation proceedings. The State should, however, provide the assistance of counsel where an indigent person may have difficulty in presenting his version of disputed facts without cross-examination of witnesses or presentation of complicated documentary evidence. Presumptively, counsel should be provided where the person requests counsel, based on a timely and colorable claim that he has not committed the alleged violation, or if that issue be uncontested, there are reasons in justification or mitigation that might make revocation inappropriate.[6.6]

With respect to the granting of parole, the Court's analysis of the due process clause's meaning in *Greenholtz v. Nebraska Penal Inmates*[7.5] is much more problematical. Rejected was the theory that the mere establishment of the possibility of parole was sufficient to create a liberty interest entitling any prisoner meeting the general standards of eligibility to a due process protected expectation of being dealt with in any particular way. On the other hand, the Court did recognize in the particular statute before it the creation of some expectancy of release that was entitled to some measure of constitutional protection, while cautioning that only by a case-by-case analysis could it be said whether other parole statutes similarly created such expectancy. In any event, the Court turned to the nature of the decisions that parole authorities must make to hold that the full panoply of due process guarantees are not required; procedures designed to elicit specific facts are inappropriate under the circumstances. Rather, the minimizing of the risk of error is the prime consideration and that goal was achieved by the board's largely informal methods, thus allowing discarding of the lower court's imposition of requirements of formal hearings, notice, and specification of particular evidence in the record as justifying the decision to deny release. The inmate was afforded an opportunity to be heard and when parole was denied he was informed in what respects he fell short of qualifying. That afforded the process that was due.

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[6.6] *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

[7.5] 442 U.S. 1 (1979). Justice Powell thought that creation of a parole system did create a legitimate expectancy of fair procedure protected by due process, but, save in one respect, he agreed with the Court that the procedure followed was adequate. Id., 18. Justices Marshall, Brennan, and Stevens argued in dissent that the Court's analysis of the liberty interest was faulty and that due process required more than the board provided. Id., 22.

[P. 1460, in text following N. 21, add:]

Elaboration of the constitutional process by which civil commitments may be effectuated has occupied the Court, leading it to pass upon both the substantive and the procedural restraints which due process imposes.

In *O'Connor* v. *Donaldson*,[21.1] bypassing "the difficult issues of constitutional law" raised by the lower courts' resolution of the case,[21.2] the Court held that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[21.3] It having been found by the jury at trial that Donaldson was neither dangerous to himself nor to others, the Court found that he had been unconstitutionally confined and sent the case back to trial to determine if he should recover personally from his doctors and others for his confinement under the standards previously laid down judicially.[21.4] Left to resolution another day were such questions as "when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness"[21.5] and the right, if any, to receive treatment for the confined person's illness.[21.6]

Procedurally, it is clear that an individual's liberty interest in being free from unjustifiable confinement and from the adverse social consequences of being labeled mentally ill requires government to assume a greater share of the risk of error in proving the existence of such illness as a precondition to confinement. Thus, the evidentiary standard of a preponderance, normally used in litigation between private parties, is constitutionally inadequate in commitment proceedings; on the other hand, the criminal standard of beyond a reasonable

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[21.1] 422 U.S. 563 (1975).

[21.2] "Specifically, there is no reason now to decide whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the State, or whether the State may compulsorily confine a nondangerous, mentally ill individual for the purpose of treatment." Id., 573.

[21.3] Id., 576.

[21.4] Id., 576–577. The standards were generally set out in *Wood* v. *Strickland*, 420 U.S. 308 (1975), and *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).

[21.5] *O'Connor* v. *Donaldson*, 422 U.S. 563, 573 (1975). The issue thus invokes both substantive and procedural due process.

[21.6] The Fifth Circuit had determined that when the basis for confinement is the person's need for treatment, the due process clause mandates that at least adequate treatment be accorded and that regardless of the basis for confinement the quid pro quo is some form of treatment to restore the person to competency. *Donaldson* v. *O'Connor*, 493 F. 2d 507, 521–522 (C.A. 5, 1974). Concurring in the Supreme Court decision, Chief Justice Burger rejected the right to treatment as a constitutional right. Id., 422 U.S., 578. See generally "Developments in the Law—Civil Commitment of the Mentally Ill," 87 Harv. L. Rev. 1190, 1324-1358 (1974).

doubt is not necessary because the state's aim is not punitive and because some or even much of the consequences of an erroneous decision not to commit may fall upon the individual. Moreover, the criminal standard addresses an essentially factual question, whereas interpretative and predictive determinations must also be made in reaching a conclusion on commitment. The Court therefore imposed a standard of "clear and convincing" evidence.[7.8]

Difficult questions of what due process may require in the context of commitment of allegedly mentally ill and mentally retarded children by their parents or by the State when such children are wards of the State were confronted in *Parham* v. *J. R.*[8.8] Under the laws under challenge, there were no formal preadmission hearings but psychiatric and social workers did interview parents and children and reached some form of independent determination that commitment was called for. The Court acknowledged the potential for abuse but held that the responsibility of parents for the care and nurture of their children and the legal presumption that parents usually acted in behalf of their children's welfare, the independent role of medical professionals in deciding to accept for admission the children, and the real possibility that the institution of an adversary proceeding would both deter parents from acting in good faith to institutionalize children needing such care and interfere with the ability of parents to assist with the care of institutionalized children.[9.8] Similarly, the same concerns, reflected in the statutory obligation of the State to care for children in its custody, caused the Court to apply the same standards to involuntary commitment by the government.[10.8] Left to future resolution was the question of the due process requirements for postadmission review of the necessity for continued confinement.[11.8]

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[7.8] *Addington* v. *Texas*, 441 U.S. 418 (1979). See also *Vitek* v. *Jones*, 445 U.S. 480 (1980) (transfer of prison inmate to mental hospital).

[8.8] 442 U.S. 584 (1979). See also *Secretary of Public Welfare* v. *Institutionalized Juveniles*, 442 U.S. 640 (1979).

[9.8] Id., 442 U.S. 598–617. The dissenters agreed on this point. Id., 626–627.

[10.8] Id., 617–620. The dissenters would have required a preconfinement hearing. Id., 637–639.

[11.8] Id., 617. The dissent would have mandated a formal postadmission hearing. Id., 625–639.

## Equal Protection of the Laws

### State Action

**[P. 1461, add to N. 2:]**

For cases raising state action in the due process rather than equal protection context, see *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Flagg Bros.* v. *Brooks*, 436 U.S. 149 (1978).

**[P. 1461, add to N. 5:]**

To the cases finding no state action should be added *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), and *Flagg Bros.* v. *Brooks*, 436 U.S. 149 (1978).

Also to be noted is *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94 (1973). The standards formulated in *Irvis*, *Jackson*, and *Brooks* have the effect of freeing from constitutional constraints much private conduct that is implicated somehow with the government. See also *Hudgens* v. *NLRB*, 424 U.S. 507 (1976). But see *Norwood* v. *Harrison*, 413 U.S. 455 (1973), and *Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974), preserved in *Brooks*, *supra*, 162.

**[P. 1461, following N. 5 in text, add:]**

Confronting in a case arising from Denver, Colorado, the issue of a school system in which no statutory dual system had ever been imposed, the Court restated the obvious principle that racial segregation caused by "intentionally segregative school board actions" is *de jure* and not *de facto*, just as if it had been mandated by statute. "[T]he differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate."[1.5] Where it is proved that a meaningful portion of a school system is segregated as a result of official action, the official agency must bear the burden of proving that other school segregation within the system is adventitious and not the result of official action. It is not the responsibility of complainants to show that each school in a system is *de jure* segregated to be entitled to a system-wide desegregation plan.[2.5] Moreover, the Court has also apparently adopted a rule to the effect that if it can be proved that at some time in the past a school board has purposefully maintained a racially separated system, a continuing obligation to dismantle that system can be said to have devolved upon the agency at that earlier point so that its subsequent actions can be held to a standard of having promoted desegregation or of not having promoted it, so that facially neutral or ambiguous school board policies can form the basis for a judicial finding of intentional discrimination.[3.5]

Different results, however, follow when inter-district segregation is an issue. Disregard of district lines is permissible by a federal court in formulating a desegregation plan only when it finds an inter-district violation. "Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district, have been a sub-

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[1.5] *Keyes* v. *Denver School District*, 413 U.S. 189, 208 (1973) (emphasis by Court). See also *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 457 n. 5 (1979).

[2.5] Id., 208–213. The continuing validity of the *Keyes* shifting-of-the-burden principle, after *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406 (1977), was asserted in *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 455–458 & n. 7, 467–468 (1979), and *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 540–542 (1979).

[3.5] *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 455–461 (1979); *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 534–540 (1979).

stantive cause of inter-district segregation."[4.8] The *de jure-de facto* distinction is thus well established in school cases and is firmly grounded upon the "state action" language of the Fourteenth Amendment.

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[4.8] *Milliken v. Bradley*, 418 U.S. 717, 744–745 (1974).

[P. 1467, following N. 10 in text, add:]

The Court has made clear that governmental involvement with private persons or private corporations is not the critical factor in determining the existence of "state action." Rather, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[5.0] Or, to quote Judge Friendly, who first enunciated the test this way, the "essential point" is "that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury. Putting the point another way, the state action, not the private, must be the subject of the complaint."[5.1] Therefore, the Court found no such nexus between the State and a public utility's action in terminating service to complainant in order to attribute the action to the State. Neither the fact that the business was subject to state regulation, nor that the State had conferred in effect a monopoly status upon the utility, nor that in reviewing the company's tariff schedules the regulatory commission had in effect approved the termination provision included therein (but had not required the practice, had "not put its own weight on the side of the proposed practice by ordering it")[5.5] operated to make the utility's action the State's action.[5.6] Significantly tightening the standard further against a finding of "state action," the Court asserted that plaintiffs must establish not only that a private party "acted under color of the challenged statute, but also that its actions are properly attributable to the State. . . ."[7.5] And the actions are to be

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[5.0] *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (under the due process clause).

[5.1] *Powe v. Miles*, 407 F. 2d 73, 81 (C.A. 2. 1968).

[5.5] *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357 (1974). In dissent, Justice Marshall protested that the quoted language marked "a sharp departure" from precedent, "that state authorization and approval of 'private' conduct has been held to support a finding of state action." Id., 369. Note that in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the plurality opinion used much the same analysis to deny antitrust immunity to a utility practice merely approved but not required by the regulating commission, but most of the Justices were on different sides of the same question in the two cases.

[5.6] *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351–358 (1974). On the due process limitations on the conduct of public utilities, see *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978).

[7.5] *Flagg Bros. v. Brooks*, 436 U.S. 149, 156 (1978) (due process).

attributable to the State apparently only if the State compelled the actions and not if also the State established the process through statute or regulation under which the private party acted. Thus, when a private party, having someone's goods in his possession and seeking to recover the charges owed on storage of the goods, acts under a permissive state statute to sell the goods and retain out of the proceeds his charges, his actions are not governmental action and need not follow the dictates of the due process clause.[21.2] Decisions in these two cases probably put to rest any questions left after the inconclusive debate among the Justices with regard to whether the broadcast media are impressed with state action, because of governmental licensing and regulation and the allocation of the broadcast spectrum to stations.[21.3]

Also narrowed in one of the recent cases was the public function aspect of "state action" under which the Constitution applies to the actions of private parties when they are entrusted by government with the performance of a public function. This doctrine is now limited, on the Court's reading of prior cases, to a delegation of "a power 'traditionally exclusively reserved to the State.'"[21.4] Since "the settlement of disputes between debtors and creditors is not traditionally an exclusive public function",[21.5] unlike the conducting of elections or the operating of a town,[21.6] the exercise of power by a creditor under a permissive state statute does not constitute "state action."

One must also note that judicial inquiry into the existence of "state action" may be directed toward the implementation of either of two remedies and this may well lead to some difference in the search. Thus, in the cases considered here and in the text of the main volume, suits were against the private actor to compel him to halt his discriminatory action, to enjoin him to admit blacks to a lunch counter for example. But one could just as readily bring suit against the government to compel it to cease aiding the private actor because of his dis-

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[21.2] Id., 164-166.

[21.3] *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973). Although the rubric in this case is in terms of "state action," the case actually dealt with "federal action" and the application of the *First* and *Fifth Amendments* rather than the *Fourteenth*, but the analysis is the same.

[21.4] *Flagg Bros. v. Brooks*, 436 U.S 149, 157 (1978) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974)).

[21.5] *Flagg Bros. v. Brooks*, *supra*, 161. In dissent, Justice Stevens argued that it made little doctrinal sense to hold that a State may authorize a private party to deprive a person of his property without due process of law while simultaneously holding that the minimal involvement of a state functionary performing ministerial duties made similar actions subject to the due process clause. Id., 168. The latter cases include *Fuentes v. Shevin*, 407 U.S. 67 (1972), and *North Georgia Finishing v. Di-Chem*, 419 U.S. 601 (1975).

[21.6] *Flagg Bros. v. Brooks*, *supra*, 158-159. The "company town" aspect was first expanded and then substantially contracted. See *Hudgens v. NLRB*, 424 U.S. 507 (1976).

criminatory conduct. Recurrence to the latter remedy might well avoid constitutional issues that an order directed to the private party would raise.[12.6] But in any event, it must be determined whether the governmental involvement is sufficient to give rise to a constitutional remedy: in a suit against the private party it must be determined whether he is so involved with the government as to be subject to constitutional restraints while in a suit against the government agency it must be determined whether the government's action "impermissibly fostered" the private conduct.

Thus, in *Norwood* v. *Harrison*,[12.7] the Court struck down the provision of free textbooks by the State to private schools set up as racially segregated institutions to avoid desegregated public schools, even though the program predated the establishment of these schools. "[A]ny tangible state assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is constitutionally prohibited if it has 'a significant tendency to facilitate, reinforce, and support private discrimination.' . . . The constitutional obligation of the State requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discriminations."[12.8] And in a subsequent case, the Court approved a lower court order that barred the city from permitting exclusive temporary use of public recreational facilities by segregated private schools because that interfered with an outstanding order mandating public school desegregation. But it remanded for further factfinding with respect to permitting nonexclusive use of public recreational facilities and general government services by segregated private schools in order that the district court could determine whether such use "involves government so directly in the actions of those users as to warrant court intervention on constitutional grounds."[12.9] Unlike the situation in which private club discrimination is attacked directly, "the question of the existence of state action centers in the extent of the city's involvement in discriminatory actions by private agencies using public facilities. . . ." Receipt of just any sort of benefit or service at all does not by the mere provision—electricity, water, and police and fire protection, access generally to municipal recreational facilities—constitute a showing of state involvement in discrimination and the lower court's order was too broad

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[12.6] For example, rights of association protected by the First Amendment. See *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 179-180 (1972) (Justice Douglas dissenting); *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 575 (1974); *Norwood* v. *Harrison*, 413 U.S. 455, 470 (1973). The right can be implicated as well by affirmative legislative action barring discrimination in private organizations. See *Runyon* v. *McCrary*, 427 U.S. 160, 175-179 (1976).

[12.7] 413 U.S. 455 (1973).

[12.8] *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 568-569 (1974), quoting *Norwood* v. *Harrison*, 413 U.S. 455, 466, 467 (1973).

[12.9] *Gilmore* v. *City of Montgomery*, 417 U.S. 556, 570 (1974).

because not predicated upon a proper finding of state action. "If, however, the city or other governmental entity rations otherwise freely accessible recreational facilities, the case for state action will naturally be stronger than if the facilities are simply available to all comers without condition or reservation." The lower court was directed to sift facts and weigh circumstances on a case-by-case basis in making determinations.[17.5]

It should be noted, however, that in a 1976 decision the Court, without mentioning these cases, greatly limited the operation of the principle by holding that plaintiffs, seeking to have withdrawn governmental tax benefits accorded to institutions that allegedly discriminated against complainants and thus involved the government in their actions, must in order to be able to bring the suit show that revocation of the benefit would cause the institutions to cease the complained of conduct.[18.5]

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[17.5] *Id.*, 573–574.

[18.5] *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976). See id. 46, 63–64 (Justice Brennan concurring and dissenting).

**[P. 1468, add to N. 11:]**

Adoption by the Court of the "nexus" test has pretty well made erroneous the statement in the text, except perhaps in race cases. The Fourth Circuit adheres to the cases cited, even in nonracial cases, e.g., *Christhilf* v. *Annapolis Emergency Hosp. Assn.*, 496 F. 2d 174 (C.A. 4, 1974); *Sams* v. *Ohio Valley General Hosp. Assn.*, 413 F. 2d 826 (C.A. 4, 1969); and see *O'Neil* v. *Grayson County War Mem. Hosp.*, 472 F. 2d 1140 (C.A. 6, 1973), but the majority view is that funding alone does not imbue a private institution with state action. *Greco* v. *Orange Mem. Hosp. Corp.*, 513 F. 2d 873 (C.A. 5), *cert. den.*, 423 U.S. 1000 (1975); *Wahba* v. *New York Univ.*, 492 F. 2d 96 (C.A. 2), *cert den.*, 419 U.S. 874 (1974); *New York City Jaycees* v. *United States Jaycees*, 512 F. 2d 856 (C.A. 2, 1976).

**[P. 1468, add to N. 12:]**

Similarly, the "nexus" test has placed in doubt the "state action" effects of tax benefits. While there are cases finding the requisite degree of state action, e.g., *Pitts* v. *Dept. of Revenue*, 333 F. Supp. 662 (D.C.E.D. Wis. 1971); *Jackson* v. *Statler Foundation*, 496 F. 2d 623 (C.A. 2, 1974), the majority rule appears to be to the contrary. *New York City Jaycees* v. *United States Jaycees*, 512 F. 2d 856 (C.A. 2, 1976); *Junior Chamber of Commerce* v. *United States Jaycees*, 495 F. 2d 883 (C.A. 10, 1974); *Greenya* v. *George Washington Univ.*, 512 F. 2d 556 (C.A.D.C.), *cert. den.*, 423 U.S. 995 (1975).

**[P. 1469, add to N. 18:]**

On the circumscribing of the "public function" theory, see *Flagg Bros.* v. *Brooks*, 436 U.S. 149, 157–164 (1978), and *Hudgens* v. *NLRB*, 424 U.S. 507 (1976).

## Standard of Review

**[P. 1477, following final paragraph of section, add:]**

Equal protection analysis continues in a state of flux with respect to whether the Court adheres to a "two-tier" approach, or whether it has accepted a three- or multiple-tier mode of analysis. One influential commentator argued that the Court was moving to adoption of an intermediate standard, at least in some cases, in which in the absence of the factors leading to strict scrutiny, the Court would go beyond the minimum rationality standard to one of "intensified means" scrutiny under which the Justices would examine the means used to effectuate a legislative end and determine whether the statute bears a rational relationship to that end.[1.5] However, in a major evaluation of equal protection analysis early in this period, Justice Powell for the Court utilized solely the two-tier approach, determining that because the interests involved did not occasion strict scrutiny the Court would thus decide the case on minimum rationality standards.[2.5] Dissenting, Justice Marshall objected to this "rigidified approach" and argued that the Court's precedents in fact reveal "that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[3.5]

Without extended consideration of the issue of standards, the Court more recently adopted an intermediate level of scrutiny, perhaps one encompassing several degrees of intermediate scrutiny. Thus, gender classifications must, in order to withstand constitutional challenge, "serve important governmental objectives and must be substantially related to achievement of those objectives."[4.5] And classifications that disadvantage illegitimates are subject to a similar though

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[1.5] Gunther, "Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harv. L. Rev. 1 (1972).

[2.5] *San Antonio School District v. Rodriguez*, 411 U.S. 1, 29-40 (1973). See also *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-314 (1976); *Maher v. Roe*, 432 U.S. 464, 470 (1977).

[3.5] *San Antonio School District v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (dissenting). Justice Marshall had previously advocated the position in *Dandridge v. Williams*, 397 U.S. 471, 520-521 (1970) (dissenting). See also *Marshall v. United States*, 414 U.S. 417, 430, 432 (1974) (dissenting); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 317-321 (1976) (dissenting). Justice White in *Vlandis v. Kline*, 412 U.S. 441, 456, 458-459 (1973), accepted Justice Marshall's analysis as accurately reflecting the Court's practice, while Chief Justice Burger and Justice Rehnquist did not. Id., 459, 460-461.

[4.5] *Craig v. Boren*, 429 U.S. 190, 197 (1976). Justice Powell noted that he agreed the precedents made clear that gender classifications are subjected to more critical examination than when "fundamental" rights and "suspect classes" are absent, id., 210 (concurring), and added: "As is evident from our opinions, the Court has had difficulty in agreeing upon a standard of equal protection analysis that can be applied consistently to the wide variety of legislative classifications. There are valid reasons for dissatisfaction with the 'two-tier' approach that has been prominent in the Court's decisions in the past decade. Although viewed by many as a result-oriented substitute for more critical analysis, that approach—with its narrowly limited 'upper tier'— now has substantial apparently less exacting scrutiny of purpose and fit.[illegible] Moreover, this period saw the incorporation into equal protection adjudication of doctrines developed in due process litigation to pinpoint as "fundamental" interests and thus entitling to strict scrutiny governmental interferences with the entry into the marital state and perhaps other such relationships.[illegible]

On the other hand, this period also saw a withdrawal of the Court from the principle that alienage is always a suspect classification [illegible] and the development of an increasing reluctance on the part of the Court in applying strict scrutiny to always void a classification.[illegible] Many interests and classifications that have some claim toward being labeled "fundamental" or "suspect" were relegated to traditional minimum rationality scrutiny.[illegible] In some respects, the restraint and

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precedential support. As has been true of *Reed* and its progeny, our decision today will be viewed by some as a 'middle-tier' approach. While I would not endorse that characterization and would not welcome a further subdividing of equal protection analysis, candor compels the recognition that the relatively deferential 'rational basis' standard of review normally applied takes on a sharper focus when we address a gender-based classification. So much is clear from our recent cases." Ibid., n. *. Justice Stevens wrote that in his view the two-tiered analysis does not describe a method of deciding cases "but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion." Id., 211, 212. Chief Justice Burger and Justice Rehnquist would employ the rational basis test for gender classifications. Id., 215, 217 (dissenting). Applying the test in other gender cases are *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Califano v. Webster*, 430 U.S. 313 (1977); *Orr v. Orr*, 440 U.S. 268 (1979); *Califano v. Westcott*, 443 U.S. 76 (1979); *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980).

[illegible] *Trimble v. Gordon*, 430 U.S. 762 (1977); *Lalli v. Lalli*, 439 U.S. 259 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Parham v. Hughes*, 441 U.S. 347 (1979); *Califano v. Boles*, 443 U.S. 282 (1979). In *Mathews v. Lucas*, 427 U.S. 495, 506 (1976), it was said that "discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes." *Lucas* sustained a statutory scheme virtually identical to the one struck down in *Califano v. Goldfarb*, 430 U.S. 199 (1977), except that the latter involved gender while the former involved illegitimacy.

[illegible] *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marry). Compare *Califano v. Jobst*, 434 U.S. 47 (1977); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

[illegible] *Foley v. Connelie*, 435 U.S. 291 (1978); *Ambach v. Norwick*, 441 U.S. 68 (1979).

[illegible] E.g., *Marston v. Lewis*, 410 U.S. 679 (1973); *Storer v. Brown*, 415 U.S. 724 (1974); *American Party of Texas v. White*, 415 U.S. 767 (1974); *Sosna v. Iowa*, 419 U.S. 393 (1975). See also *Gaffney v. Cummings*, 412 U.S. 735 (1973); *Mahan v. Howell*, 410 U.S. 315 (1973).

[illegible] E.g., *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973) (education as fundamental interest and wealth as suspect classification); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (age); *Vance v. Bradley*, 440 U.S. 93 (1979) (age); *Maher v. Roe*, 432 U.S. 464 (1977) (abortion as fundamental interest and indigency as suspect classification); *Harris v. McRae*, 448 U.S. 297 (1980) (same).

activism in this area seem to follow, inversely, the activism and restraint by the Court in the utilization of the irrebutable presumption doctrine as an alternative to equal protection analysis.[10.5]

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[10.5] See *Weinberger* v. *Salfi*, 422 U.S. 749 (1975) (curbing doctrine). The cases in this line appear to be being assimilated into equal protection analysis. See *Craig* v. *Boren*, 429 U.S. 190, 199 (1976) (using *Stanley* and *LaFleur*); *Mathews* v. *Lucas*, 427 U.S. 495, 512 (1976) (using *Vlandis*). In other areas, the equal protection disputes about fundamental rights—suspect classes may appear as well in somewhat new guises. E.g., *Baldwin* v. *Montana Fish & Game Comm.*, 436 U.S. 371 (1978) (privileges and immunities); *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978) (obligation of contracts).

## Traditional Equal Protection

### [P. 1478, add to N. 4:]

See *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Kahn* v. *Shevin*, 416 U.S. 351 (1974). And see *City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369 (1974).

### [P. 1480, add to N. 7:]

See *City of Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369 (1974).

### [P. 1480, add to N. 15:]

This case was formally overruled in *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).

### [P. 1485, in text following N. 10, add:]

The Court has now made it clear that only the totally irrational classification in the economic field will be struck down,[1.5] and it has

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[1.5] *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976). Upholding an ordinance that banned all pushcart vendors from the French Quarter, except those in continuous operations for more than eight years, the Court summarised its method of decision here. "When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. . . . Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step-by-step . . . in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. . . . In short, the judiciary may not sit as a super-legislature to judge the wisdom or undesirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines . . .; in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." Id., 303–304.

held that legislative classifications that impact severely upon some businesses and quite favorably upon others may be saved through stringent deference to legislative judgment.[2.3]

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[2.3] The "grandfather" clause preserved the operations of two concerns that had operated in the Quarter for 20 years. The classification was sustained as (1) the City Council proceeding step-by-step and eliminating vendors of more recent vintage, (2) the Council deciding that newer businesses were less likely to have built up sustantial reliance interests in continued operation in the Quarter, and (3) the Council believing that both "grandfathered" vending interests had themselves become part of the distinctive character and charm of the Quarter. Id. 305–306. See also *Friedman* v. *Rogers*, 440 U.S. 1, 17–18 (1979). And see *Mass. Bd. of Retirement* v. *Murgia*, 427 U.S. 307 (1976); *Vance* v. *Bradley*, 440 U.S. 93 (1979) (mandatory retirement at prescribed age).

**[P. 1488, in "Geographical discriminations" section of N. 10, add:]**

And see *North* v. *Russell*, 427 U.S. 328, 338 (1976).

**[P. 1488, add to N. 12:]**

This case was expressly overruled in *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976).

**[P. 1490, add to N. 10:]**

Neither is it a denial of equal protection for a city to refuse to withhold from its employees' paychecks dues owing their union, although it withholds for taxes, retirement-insurance programs, saving programs, and certain charities, because its offered justification that its practice of allowing withholding only when it benefits all city or department employees is a legitimate method to avoid the burden of withholding money for all persons or organizations that request a checkoff. *City of Charlotte* v. *Firefighters*, 426 U.S. 283 (1976).

**[P. 1492, add to N. 4:]**

The standard of review "is not a toothless one." Nonetheless, there is a strong presumption of constitutionality which government rarely fails to rise above. *Mathews* v. *DeCastro*, 429 U.S. 181, 185 (1976). See also *Califano* v. *Jobst*, 434 U.S. 47 (1977); *Maher* v. *Roe*, 432 U.S. 464, 478–480 (1977). Compare *Dept. of Agriculture* v. *Moreno*, 413 U.S. 528 (1973), with *Johnson* v. *Robison*, 415 U.S. 361 (1974) (all but *Maher* under Fifth Amendment).

**[P. 1492, add to N. 7:]**

And in *North* v. *Russell*, 427 U.S. 328, 338 (1976), the Court sustained the provision of law-trained judges for some police courts and lay judges for others, depending upon the state constitutional classification of cities according to population, since as long as all people within each classified area are treated equally, the different classifications within the court system are justifiable.

**[P. 1493, in text following N. 13, add:]**

A statute denying state prisoners good time credit for presentence incarceration but permitting those prisoners who obtain bail or other release immediately to receive good time credit for the entire period which they ultimately spend in custody, good time counting toward the date of eligibility for parole, does not deny the prisoners incarcerated in local jails equal protection inasmuch as the distinction is rationally justified by the fact that good time credit is designed to encourage prisoners to engage in rehabilitation courses and activities which exist only in state prisons and not in local jails.[2.1]

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[2.1] *McGinnis* v. *Royster*, 410 U.S. 263 (1973). Cf. *Hurtado* v. *United States*, 410 U.S. 578 (1973) (Fifth Amendment).

**[P. 1693, add to N. 15:]**

But see *Fuller* v. *Oregon*, 417 U.S. 40 (1974) (imposition of reimbursement obligation for state-provided defense assistance upon convicted defendants but not upon those not convicted or whose convictions are reversed is objectively rational).

## Equal Protection and Race

**[P. 1694, in text following N. 2, add:]**

It is necessary that one claiming harm through official discrimination must prove an intent or a motive to discriminate. "[A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another."[2.3] In reliance upon a prior Supreme Court decision that had seemed to eschew motive or intent and to pinpoint effect as the key to a constitutional violation[2.4] and upon the Court's decisions reading congressional civil rights enactments as providing that when employment practices disqualifying disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices,[2.5] a number of lower federal courts had developed in constitutional litigation a "disproportionate impact" analysis under which a violation could be established upon a showing that a statute or practice adversely affected a class without regard to discriminatory purpose, absent some justification going substantially beyond what

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[2.3] Washington v. Davis, 426 U.S. 229, 242 (1976).

[2.4] The principal case was *Palmer* v. *Thompson*, 403 U.S. 217 (1971), in which a 5-to-4 majority refused to order a city to reopen its swimming pools closed allegedly to avoid complying with a court order to desegregate them. The majority opinion strongly warned against voiding governmental action upon an assessment of official motive, id., 224-226, but it also, and the *Davis* Court so read it as actually deciding, drew the conclusion that since the pools were closed for both whites and blacks there was no discrimination and that the city's avowed reason for closing the pools was to avoid violence and economic loss, which could not be impeached by allegations of a racial motive. See also *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972).

[2.5] *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). The *Davis* Court adhered to this reading of Title VII, merely refusing to import the statutory standard into the constitutional standard. Washington v. Davis, 426 U.S. 229, 238-239, 246-248 (1976). Subsequent cases involving gender discrimination raised the question of the vitality of *Griggs*, *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976); *Nashville Gas Co.* v. *Satty*, 434 U.S. 136 (1977), but the disagreement among the Justices appears to be whether *Griggs* applies to each section of the antidiscrimination provision of Title VII. See *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *Furnco Const. Co.* v. *Waters*, 438 U.S. 567 (1978).

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would be necessary to validate most other classifications.[4] These cases were disapproved in *Davis;* but the Court did note that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it be true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds."[5]

Both elucidation and not a little confusion followed upon application of *Davis* in the following Terms. Looking to a challenged zoning decision of a local board which had impacted more harshly upon blacks and low-income persons than on others, the Court explained in some detail how inquiry into motivation would work.[6] First, a plaintiff is not required to prove that an action rested solely on discriminatory purpose; only "a discriminatory purpose" among permissible ones need be shown and the burden shifts to defendant to show that the same decision would have resulted absent the impermissible motive.[7] Second, determining whether a discriminatory purpose was a motivating factor "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Impact provides a starting point and "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face", but this is a rare case.[8.5] In the absence of such a stark pattern, a court will look to such factors as the "historical background of the decision", especially if there is a series of official discriminatory actions. The specific sequence of events may shed light on purpose as would departures from normal procedural sequences or from substantive considerations usually relied on in the past to guide official actions. Contemporary statements of decisionmakers may be examined and "[i]n some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege." [9.5] In most circumstances, a court is to look to the totality of the circumstances to ascertain intent.

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[4] See *Washington* v. *Davis*, 426 U.S. 229, 244 n. 12 (1976) (listing and disapproving cases). Cases not cited by the Court included the Fifth Circuit's wrestling with the *de facto-de jure* segregation distinction. In *Cisneros* v. *Corpus Christi Ind. School Dist.*, 467 F. 2d 142, 148–150 (C.A. 5, 1972) (*en banc*), *cert. den.*, 413 U.S. 920 (1973), the court held that motive and purpose were irrelevant and the "*de facto* and *de jure* nomenclature" to be "meaningless. After the distinction was reiterated in *Keyes* v. *Denver School District*, 413 U.S. 189 (1973), the Fifth Circuit adopted the position that a decisionmaker must be presumed to have intended the probable, natural, or foreseeable consequences of his decision and thus that a school board decision, whatever its facial motivation, that results in segregation is intentional in the constitutional sense. *United States* v. *Texas Educ. Agency*, 532 F. 2d 380 (C.A. 5), *vacated and remanded for reconsideration in light of Washington* v. *Davis*, 429 U.S. 990, (1976), *modified and adhered to*, 564 F. 2d *reh. den.*, 579 F. 2d 910 (C.A. 5, 1977–78), *cert. den.*, 443 U.S. 915 (1979). See also *United States* v. *Texas Educ. Agency*, 600 F. 2d 518 (C.A. 5, 1979). This form of analysis was, however, substantially cabined in *Massachusetts Personnel Admr.* v. *Feeney*, 442 U.S. 256, 278–280 (1979), although foreseeability as one kind of proof was acknowledged by *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 464–465 (1979).

[5] *Washington* v. *Davis*, 426 U.S. 229, 242 (1976).

[6] *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

[7] *Id.*, 265–266, 270 n. 21. See also *Mt. Healthy City Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 284–287 (1977) (once plaintiff shows defendant acted from impermissible motive in not rehiring him, burden shifts to defendant to show result would have been same in the absence of that motive; constitutional violation not established merely by showing of wrongful motive).

Strengthening of the intent standard was evidenced in a decision sustaining against a sex discrimination challenge a state law giving an absolute preference in civil service hiring to veterans. Veterans who obtain at least a passing grade on the relevant examination may exercise the preference at any time and as many times as they wish and are ranked ahead of all nonveterans, no matter what their score. The lower court observed that the statutory and administrative exclusion of women from the armed forces until the recent past meant that virtually all women where excluded from state civil service positions and held that results so clearly foreseen could not be said to be unintended. Reversing, the Supreme Court found that the veterans preference law was not overtly or covertly gender based; too many men are nonveterans to permit such a conclusion and there are women veterans. That the preference implicitly incorporated past official discrimination against women was held not to detract from the fact that awarding veterans for their service to their country was a legitimate public purpose. Acknowledging that the consequences of the preference were foreseeable, the Court pronounced this fact insufficient to make the requisite showing of intent. " 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." [10.5]

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[8.5] *Arlington Heights, supra,* 266.

[9.5] Id., 267–268.

[10.5] *Massachusetts Personnel Admr.* v. *Feeney,* 442 U.S. 256, 279 (1979). This case clearly established the application of *Davis* and *Arlington Heights* to all nonracial classifications attacked under the equal protection clause. But compare *Columbus Bd. of Educ.* v. *Penick,* 443 U.S. 449 (1979), and *Dayton Bd. of Educ.* v. *Brinkman,* 443 U.S. 526 (1979), in the context of the quotation in the text. These cases found the *Davis* standard satisfied on a showing of past discrimination coupled with foreseeable impact in the school segregation area.

Moreover, in *City of Mobile* v. *Bolden* [11.5] a plurality of the Court apparently attempted to do away with the totality of circumstances test and to evaluate standing on its own each of the factors offered to show a discriminatory intent. At issue was the constitutionality of the use of multi-member electoral districts to select the city commission. A prior decision had invalidated a multi-member districting system as discriminatory against blacks and Hispanics, without considering whether its ruling was premised on discriminatory purpose or adverse impact but listing and weighing a series of factors the totality of which caused the Court to find invidious discrimination.[12.5] But in the plurality opinion in *Mobile*, each of the factors, viewed "alone," was deemed insufficient to show purposeful discrimination.[12.5] Where, therefore, the constitutional tests for establishing intent in the absence of the rare clear showing are after this series of cases remains much in doubt.

But the Court in a jury discrimination case seemed to allow what it had said in *Davis* and *Arlington Heights* it would not permit.[13.5] Noting that disproportion alone is insufficient to establish a violation, the Court nonetheless held that plaintiff's showing that 79 percent of the county's population was Spanish-surnamed while jurors selected in recent years ranged from 39 to 50 percent Spanish-surnamed was sufficient to establish a *prima facie* case of discrimination. Several factors probably account for the difference. First, the Court has long recognized that discrimination in jury selection can be inferred from less of a disproportion than is needed to show other discriminations, in major part because if jury selection is truly random any substantial disproportion reveals the presence of an impermissible factor, whereas most official decisions are not random.[14.5] Second, the jury selection

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[11.5] 446 U.S. 55 (1980). Also decided by the plurality was that discriminatory purpose is a requisite showing to establish a violation of the Fifteenth Amendment and of the equal protection clause in the "fundamental interest" context, vote dilution, rather than in the suspect classification context. While Justices Marshall and Brennan disagreed, id., 94, 103, the other Justices agreed and disagreed with the plurality on various other grounds. The status of both these possible holdings remains in doubt.

[12.5] *White* v. *Regester*, 412 U.S. 755 (1973), was the prior case. See also *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). Justice White, the author of *Register*, dissented in *Mobile*, *supra*, 446 U.S. 94, on the basis that "the totality of the facts relied upon by the District Court to support its inference of purposeful discrimination is even more compelling than that present in *White* v. *Register*." Justice Blackmun, id., 80, and Justices Brennan and Marshall, as alternate holdings, id., 94, 103, agreed with him. Thus, the Court was at least evenly divided on this issue, regardless of where Justice Stevens comes down.

[13.5] *Castaneda* v. *Partida*, 430 U.S. 482 (1977). The decision was 5-to-4, Justice Blackmun writing the opinion of the Court and Chief Justice Burger and Justices Stewart, Powell, and Rehnquist dissenting. Id., 504, 507.

[14.5] Id., 493–494. This had been recognized in *Washington* v. *Davis*, 426 U.S. 229, 241 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 n. 13 (1977).

process was "highly subjective" and thus easily manipulated for discriminatory purposes, unlike the process in *Davis* and *Arlington Heights* which was regularized and open to inspection.[10.5] Thus, jury cases are likely to continue to be special cases and in the usual fact situation, at least where the process is open, plaintiffs will bear a heavy and substantial burden in showing discriminatory racial and other animus.

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[10.5] *Castaneda v. Partida*, 430 U.S. 482, 494, 497–499 (1977).

**[P. 1500, in text following N. 16, add:]**

This language was implemented in *Pasadena City Bd. of Educ.* v. *Spangler*,[1.5] in which the Court held that after a school board has complied with a judicially imposed desegregation plan in student assignments and thus undone the existing segregation it is beyond the district court's power to order it subsequently to implement a new plan to undo the segregative effects of shifting residences.

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[1.5] 427 U.S. 424 (1976). The Court agreed with the dissenters, Justices Marshall and Brennan, id., 436 and 441, that the school board had not complied in other respects, such as in staff hiring and promotion, but the majority thought that was irrelevant to the issue of neutral student assignments.

**[P. 1500, in text following N. 17, add:]**

**Northern Schools: Inter- and Intradistrict Desegregation.**—The appearance in the Court of school cases from large metropolitan areas in which the separation of the races was not mandated by law but allegedly by official connivance through zoning of school boundaries, pupil and teacher assignment policies, and site selections required the development of standards for determining when segregation was *de jure* and what remedies must or should be imposed when such official separation was found.[1.6]

Accepting the findings of lower courts that the actions of public school officials in Detroit and of the state school board were responsible in part for the racial segregation existing within the school system of the City of Detroit, the Court set aside a desegregation order which required the formulation of a plan for a metropolitan area

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[1.6] "The presence or absence of a statute mandating separation provides no talisman indicating the distinction between *de jure* and *de facto* segregation. *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 457 n. 5 (1979). As early as *Ex parte Virginia*, 100 U.S. 339, 347 (1880), it was said that "no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, . . . denies or takes away the equal protection of the laws . . . violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State." The significance of a statute is that it simplifies in the extreme a complainant's proof.

including the City and 53 adjacent suburban school districts.[2.5] As was noted above,[3.5] the basic holding of the Court was that such a remedy could be implemented only to cure an inter-district constitutional violation, a finding that the actions of state officials and of the suburban school districts were responsible, at least in part, for the inter-district segregation, through either discriminatory actions within those jurisdictions or constitutional violations within one district that had produced a significant segregative effect in another district.[4.5] The permissible scope of an inter-district order, however, would have to be considered in light of the Court's language regarding the value placed upon local educational units. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[5.5] Too, the complexity of formulating and overseeing the implementation of a plan that would effect a *de facto* consolidation of multiple school districts, the Court indicated, would impose a task which few, if any, judges are qualified to perform and one which would deprive the people of control of their schools through elected representatives.[6.5] "The constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district."[7.5]

"The controlling principle consistently expounded in our holdings," said the Court in the Detroit case, "is that the scope of the remedy is determined by the nature and extent of the constitutional violation."[8.5] While this axiom caused little problem when the violation

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[2.5] *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

[3.5] Supra, pp. *S245–S246*.

[4.5] *Milliken* v. *Bradley*, 418 U.S. 717, 745 (1974).

[5.5] Id., 741–742.

[6.5] Id., 743–743. This theme has been sounded in a number of cases in suits seeking remedial actions in particularly intractible areas. *Mayor* v. *Educational Equality League*, 415 U.S. 605, 615 (1974); *O'Shea* v. *Littleton*, 414 U.S. 488, 500–502 (1974). In *Hills* v. *Gautreaux*, 425 U.S. 284, 293 (1976), the Court wrote that it had rejected the metropolitan order because of "fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities . . . ." In other places, the Court stressed the absence of interdistrict violations, id., 294, and in still others paired the two reasons. Id., 296.

[7.5] *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974). The four dissenters argued both that state involvement was so pervasive that an inter-district order was permissible and that such an order was mandated because it was the State's obligation to establish a unitary system, an obligation which could not be met without an inter-district order. Id., 757, 762, 781.

[8.5] Id., 744. See *Hills* v. *Gautreaux*, 425 U.S. 284, 294 n. 11 (1976) ("[T]he Court's decision in *Milliken* was premised on a controlling principle governing the permissible scope of federal judicial power."); *Austin Ind. School Dist.* v. *United States*, 429 U.S. 990, 991 (1976) (Justice Powell concurring) ("a core principle of desegregation cases" is that set out in *Milliken*).

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consisted of statutorily mandated separation,[9.6] it has required a considerable expenditure of judicial effort and parsing of opinions to work out in the context of systems in which the official practice was nondiscriminatory but official action operated to the contrary. At first, the difficulty was obscured through the creation of presumptions that eased the burden of proof on plaintiffs but more recently the Court had appeared to stiffen the requirements on plaintiffs.

Determination of the existence of a constitutional violation and the formulation of remedies, within one district, first was presented to the Court in a northern setting in *Keyes* v. *Denver School District*.[10.6] The lower courts had found the school segregation existing within one part of the City to be attributable to official action, but as to the central city they found the separation not to be the result of official action and refused to impose a remedy for those schools. The Supreme Court found this latter holding to be error, holding that when it is proved that a significant portion of a system is officially segregated, the presumption arises that segregation in the remainder or other portions of the system is also similarly contrived and the burden is on the school board or other officials to rebut the presumption by proving, for example, that geographical structure or natural boundaries have caused the dividing of a district into separate identifiable and unrelated units. Thus, a finding that one significant portion of a school system is officially segregated may well be the predicate for finding that the entire system is a dual one, necessitating the imposition upon the school authorities of the affirmative obligation to create a unitary system throughout.[11.6]

*Keyes* then was consistent with both the necessity of showing official complicity in separation and in limiting the remedy to the violation found; it simply through its creation of presumptions afforded plaintiffs a way to surmount the barriers imposed by strict application of the requirements. Following the enunciation in the *Detroit*

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[9.6] When an entire school system has been separated into white and black schools by law, disestablishment of the system and integration of the entire system is required. "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. . . . The measure of any desegregation plan is its effectiveness." *Davis* v. *Bd. of School Comrs.*, 402 U.S. 33, 37 (1971). See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25 (1971).

[10.6] 413 U.S. 189 (1973).

[11.6] Id., 207–211. Justice Rehnquist argued that imposition of a district-wide segregation order should not proceed from a finding of segregative intent and effect in only one portion, that in effect the Court was imposing an affirmative obligation to integrate without first finding a constitutional violation. Id., 254 (dissenting). Justice Powell cautioned district courts against imposing disruptive desegregation plans, especially substantial busing in large metropolitan areas, and stressed the responsibility to proceed with reason, flexibility, and balance. Id., 217, 238 (concurring and dissenting). See his opinion in *Austin Ind. School Dist.* v. *United States*, 429 U.S. 990, 991 (1976) (concurring).

inter-district case, however, of the "controlling principle" of school desegregation cases, the Court appeared to move away from the *Keyes* approach.[12.5] First, in *Pasadena City Bd. of Educ. v. Spangler*,[12.6] although not all of the district court's order had been effectuated, the student assignment plan had resulted in integration of the schools, but in the following years residential pattern changes had again resulted in pupil racial imbalances and the district court ordered the school board to remedy those imbalances. The Court held that federal equity power was lacking to impose orders to correct shifts "not attributed to any segregative actions on the part of the defendants."[12.7]

Second, in the first *Dayton* case, the lower courts had found three constitutional violations that had resulted in some pupil segregation and based on these three, viewed as "cumulative violations," a district-wide transportation plan had been imposed. Reversing, the Supreme Court reiterated that the remedial powers of the federal courts are called forth by violations and are limited by the scope of those violations. "Once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit 'the nature and extent of the constitutional violation.'"[12.8] The goal is to restore the plaintiffs to the position they would have occupied had they not been subject to unconstitutional action. Lower courts "must determine how much incremental segregative effect these violations had on the racial distribution of the Dayton school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations. The remedy must be designed to redress that difference, and only if there has been a systemwide impact may there be a systemwide remedy."[12.9] The Court then sent the case back to the district court for the taking of evidence, the finding of the nature of the violations, and the development of an appropriate remedy.

Surprisingly, however, *Keyes* was reaffirmed and broadly applied in subsequent appeals of the *Dayton* case after remand and in an appeal

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[12.5] Of significance was the disallowance of the disproportionate impact analysis in constitutional interpretation and the adoption of an apparently strengthened intent requirement. *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977); *Massachusetts Personnel Admr. v. Feeney*, 442 U.S. 256 (1979). This principle applies in the school area. *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 (1977).

[12.6] 427 U.S. 424 (1976).

[12.7] Id., 436

[12.8] *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977) (quoting *Hills v. Gautreaux*, 425 U.S. 284, 294 (1976)).

[12.9] *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977). The Court did not discuss the presumptions that had been permited by *Keyes*. Justice Brennan, the author of *Keyes*, concurred on the basis that the violations found did not justify the remedy imposed, asserting the methods of proof utilized in *Keyes* as continuingly valid. Id., 421.

from Columbus, Ohio.[17.3] Following the Supreme Court's standards, the *Dayton* district court held that plaintiff's had failed to prove official segregative intent but was reversed by the appeals court. The *Columbus* district court had found and had been affirmed in finding racially discriminatory conduct and had ordered extensive busing. The Supreme Court held that the evidence adduced in both district courts showed that the school boards had carried out segregating actions affecting a substantial portion of each school system prior to and contemporaneously with the 1954 decision in *Brown v. Board of Education.* The *Keyes* presumption therefore required the school boards to show that dual systems had not existed and they failed to do so. Because each system was a dual one in 1954, it was subject to an "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." [18.3] Following 1954, segregated schools continued to exist and the school boards had in fact taken actions which had the effect of increasing segregation. In the context of the on-going affirmative duty to desegregate, the foreseeable impact of the actions of the boards could be utilized to infer segregetive intent, thus satisfying the *Davis-Arlington Heights* standard.[19.3] The Court further affirmed the district-wide remedies, holding that its earlier *Dayton* ruling hod been premised upon the evidence of only a few isolated discriminatory practices; here, because systemwide impact had been found, systemwide remedies were appropriate.[20.3]

Flux marks the state of the law respecting the definition of and the remedies for *de jure* racial separation in the public schools, both North and South. The greatest amount of controversy surrounding the remedy to be imposed relates to busing. *Swann*, of course, sanctioned an order requiring fairly extensive busing, as did the most recent *Dayton* and *Columbus* cases, but the earlier case cautioned as well that there were limits occasioned by the nature of the educational process and the well-being of children that courts must observe.[21.3] While Congress has enacted several restrictions, these have proved be-

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[17.3] *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979). Justice Stewart and Chief Justice Burger concurred with the Court in *Columbus* but dissented in *Dayton*, *id.*, 443 U.S. 469, primarily on the basis of deference to the findings of the two district courts. Justices Powell and Rehnquist dissented in both cases. Id., 479, 489.

[18.3] *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 459 (1979) (quoting *Green v. School Board of New Kent County*, 391 U.S. 430, 437–438 (1968)).

[19.3] Id., 461–462, 464–465.

[20.3] Id., 465–467.

[21.3] See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 30–31 (1971).

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cause of drafting infelicities to have been largely ineffective,[22.5] and proposals for constitutional amendments have not moved.[23.5] And a majority of the Supreme Court has declined to review busing orders that dissenting Justices have pronounced to be too broad.[24.5]

Reaffirmation of the breath of federal judicial remedial powers came when, in a second appeal of the Detroit case, the Court unanimously upheld the order of a district court mandating compensatory or remedial educational programs for school children who have been subjected to past acts of *de jure* segregation. So long as the remedy is related to the condition found to violate the Constitution, so long as it is remedial, and so long as it takes into account the interests of state and local authorities in managing their own affairs, federal courts have broad and flexible powers to remedy past wrongs.[25.5]

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[22.5] See, e.g., § 407(a) of the Civil Rights Act of 1964, 78 Stat. 248, 42 U.S.C. §2000c–6, interpreted in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 17–18 (1971); § 803 of the Education Amendments of 1972, 86 Stat. 372, 20 U.S.C. § 1653 (expired), interpreted in *Drummond v. Acree*, 409 U.S. 1228 (1972) (Justice Powell in Chambers); Equal Educational Opportunities and Transportation of Students, 88 Stat. 514 (1974), 20 U.S.C. §§ 1701–1757, interpreted in *Morgan v. Kerrigan*, 530 F. 2d 401, 411–415 (C.A. 1, 1976), *cert. den.*, 426 U.S. 935 (1976); § 101 of the Labor-HEW Appropriations Act, P.L. 95–205, 91 Stat. 1460 (1977), upheld against facial attack in *Brown v. Califano*, 627 F. 2d 1221 (C.A.D.C., 1980).

[23.5] A proposal, H.J. Res. 74, 96th Congress, was brought to the floor through the discharge petition method but failed even to obtain a majority vote on July 24, 1979.

[24.5] Following the decisions in *Dayton* and *Columbus*, it appeared the Court would review an appeal premised solely on the busing order but it was eventually dismissed without decision. *Estes v. Metropolitan Branches of NAACP*, 572 F. 2d 1010 (C.A. 5, 1978), *cert. dismd. as improvidently granted*, 444 U.S. 437 (1980) (Justices Powell, Stewart, and Rehnquist dissenting), and the Court refused to review other cases. *Cleveland Bd. of Educ. v. Reed*, 607 F. 2d 714 (C.A. 6, 1979), *cert. den.*, 445 U.S. 935 (1980) (Justices Rehnquist and Powell and Chief Justice Burger dissenting); (*Delaware State Bd. of Educ. v. Evans*, 582 F. 2d C.A. 3, 1978), *cert. den.*, 446 U.S. 923 (1980) (Justices Rehnquist, Stewart, and Powell dissenting).

[25.5] *Milliken v. Bradley*, 433 U.S. 267 (1977). The Court also affirmed that part of the order directing the State of Michigan to pay one-half the costs of the mandated programs. Id., 288–291.

**[P. 1501, add to N. 2:]**

*Castaneda v. Partida*, 430 U.S. 482 (1977), was a case in which the Court found, because of statistical disparities, discrimination against Spanish-surnamed residents, even though they constituted a governing majority in the county—most of the elected county officials, the state judge who selected the persons who called jurors, and three of the five persons who called jurors were Mexican Americans.

**[P. 1502, add to N. 3:]**

On the necessity of *voir dire* examination of potential jurors to discover possible racial prejudice, see *Ham v. South Carolina*, 409 U.S. 524 (1973), and *Ristaino v. Ross*, 424 U.S. 589 (1976).

**[P. 1502, add to N. 6:]**

See *Taylor* v. *Louisiana*, 419 U.S. 522 (1975) (male defendant permitted to challenge female juror discrimination).

**[P. 1503, add to N. 10:]**

See also *Castaneda* v. *Partida*, 430 U.S. 482 (1977).

**[P. 1504, add to N. 21:]**

See also *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973). Cf. *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

**[P. 1504, add to N. 22:]**

See *Hills* v. *Gautreaux*, 425 U.S. 284 (1976) (power of federal court to award metropolitan relief against housing discrimination in public housing).

**[P. 1507, add to N. 21:]**

See also *United Jewish Orgs.* v. *Carey*, 430 U.S. 144 (1977); *Dallas County* v. *Reese*, 421 U.S. 477 (1975); *White* v. *Regester*, 412 U.S. 755 (1973).

**[P. 1507, following N. 21 in text, add:]**

### Permissible Remedial Utilizations of Racial Classifications

Of critical importance in equal protection litigation is the degree to which government is permitted to take race or another suspect classification into account in order to formulate and implement a remedy to overcome the effects of past discrimination against the class; often the issue is framed in terms of "reverse discrimination" inasmuch as the governmental action deliberately favors the members of the class and may simultaneously impact adversely upon nonmembers of the class.[21.1] While the Court in prior cases had accepted both the use of race and other suspect criteria as valid factors in formulating remedies to overcome discrimination[21.2] and the according of preferences to class members when the class has been previously the object of discrimination,[21.3] it had never until recently given plenary review to

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[21.1] While the emphasis is upon governmental action, private affirmative actions may implicate statutory bars to uses of race. E.g., *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976), held, not in the context of an affirmative action program, that whites were as entitled as any group to protection of federal laws banning racial discrimination in employment. The Court emphasized that it was not passing at all on the permissibility of affirmative action programs. Id., 280 n. 8. In *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), the Court held that title VII did not prevent employers from instituting voluntary, race-conscious affirmative action plans.

[21.2] E.g., *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 23-25 (1971).

[21.3] Programs to overcome past societal discriminations against women have been approved, *Kahn* v. *Shevin*, 416 U. S. 351 (1974); *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Califano* v. *Webster*, 430 U.S. 313 (1977), but gender classifications are not as suspect as racial ones. Preferential treatment for American Indians was approved, *Morton* v. *Mancari*, 417 U.S. 535 (1974), but on the basis that the classification was political rather than racial.

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programs that expressly used race as the prime consideration in the awarding of some public benefit.[73]

In *United Jewish Orgs. v. Carey*[74] the State in order to comply with the Voting Rights Act and to obtain the United States Attorney General's approval for a redistricting law had drawn a plan which consciously used racial criteria to create a certain number of districts with nonwhite populations large enough to permit the election of nonwhite candidates in spite of the lower voting turnout of nonwhites. In the process a Hasidic Jewish community previously located entirely within one senate and one assembly district was divided between two senate and two assembly districts and plaintiffs sued alleging that the value of the votes of the residents of the community had been diluted solely for the purpose of achieving a racial quota. The Supreme Court approved the districting, although the fragmented majority of seven concurred in no majority opinion.

Justice White, delivering the judgment of the Court, based the result on alternative grounds. First, because the redistricting took place pursuant to the administration of the Voting Rights Act, the Justice argued that compliance with the Act necessarily required States to be race conscious in the drawing of lines so as not to dilute minority voting strength, that this requirement was not dependent upon a showing of past discrimination, and that the States retained discretion to determine just what majority minority voters needed in electoral districts in order to assure their proportional representation. Moreover, the creation of the certain number of districts in which minorities were in the majority was reasonable under the circumstances.[75]

Second, Justice White wrote that, irrespective of what the Voting Rights Act may have required, what the State had done did not violate either the Fourteenth or the Fifteenth Amendment. This was the case because the plan, even though it used race in a purposeful manner, represented no racial slur or stigma with respect to whites or any other race; and the plan did not operate to minimize or unfairly cancel out white voting strength because as a class whites would be represented in the legislature in accordance with their proportion of the population in the jurisdiction.[76]

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[73] The constitutionality of a law school admissions program in which minority applicants were preferred for a number of positions was before the Court in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), but the merits were not reached.

[74] 430 U.S. 144 (1977). Chief Justice Burger dissented, id., 180, and Justice Marshall did not participate.

[75] Id., 155-165. Joining this part of the opinion were Justices Brennan, Blackmun, and Stevens.

[76] Id., 165-168. Joining this part of the opinion were Justices Stevens and Rehnquist. In a separate opinion, Justice Brennan noted that preferential race policies were subject to several substantial arguments: (1) they may disguise a policy that perpetuates disadvantageous treatment; (2) they may serve to stimu-

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With the Court so divided, light on the constitutionality of such affirmative action—benign use of race was thought to await decision in *Regents of the Univ. of California* v. *Bakke* [8.5] but again the Court fragmented. The Davis campus medical school admitted each year 100 students; the school set aside 16 seats each year for which disadvantaged minority students, who were qualified but not necessarily as qualified as those winning admission to the other 84 places were, could compete for admission. Twice denied admission, Bakke sued, arguing that had not the 16 positions been set aside he could have been admitted; the state court ordered him admitted and ordered the school not to consider race in admissions. By two 5-to-4 votes, the Supreme Court affirmed the order admitting Bakke but set aside the order forbidding the consideration of race in admissions.

Four Justices did not reach the constitutional question. In their view, Title VI of the Civil Rights Act of 1964 [9.5] outlawed the college's program and made unnecessary any consideration of the Constitution. They thus would admit Bakke and bar use of race in admissions.[10.5] The remaining five Justices agreed among themselves that Title VI, on its face and in light of its legislative history, proscribed only what the equal protection clause proscribed.[11.5] They thus reached the constitutional issue but resolved it differently. Four Justices, in an opinion by Justice Brennan, argued that racial classifications designed to further remedial purposes were not foreclosed by the Constitution under appropriate circumstances. Even ostensibly benign racial classifications could be misused and produce stigmatizing effects; therefore, they must be searchingly scrutinized by courts to ferret out these instances, but benign racial preferences, unlike invidious discriminations, need not be subjected to strict scrutiny. an intermediate scrutiny would do. As applied, then, this review would enable the Court to strike down any remedial racial classification that stigmatized any group, that singled out those least well represented in the political process to bear the brunt of the program, or that was not justified by an important and

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late society's latent race consciousness; (3) they may stigmatise recipient groups as much as overtly discriminatory practices against them do; (4) they may be perceived by many as unjust. The presence of the Voting Rights Act and the Attorney General's supervision made the difference to him in this case. Id., 168. Justices Stewart and Powell concurred basically on this part of the White opinion on the basis that there was no showing of a purpose on the legislature's part to discriminate against white voters and that the effect of the plan was insufficient to invalidate it. Id., 179.

[8.5] 438 U.S. 265 (1978).

[9.5] 78 Stat. 252, 42 U.S.C. § 2000d *et seq.* The Act bars discrimination on the ground of race, color, or national origin by any recipient of federal financial assistance.

[10.5] Id., 438 U.S., 408–421 (Justices Stevens, Stewart, and Rehnquist and Chief Justice Burger).

[11.5] Id., 284–287 (Justice Powell), 328–355 (Justices Brennan, White, Marshall, and Blackmun).

articulated purpose.[12.5] Justice Powell argued that all racial classifications are suspect and call for strict scrutiny. None of the justifications asserted by the college met this high standard of review and consequently the program must fail. But he did perceive justifications for a less rigid consideration of race as one factor among many in an admissions program; diversity of student body was an important and protected interest of an academy and would justify an admissions set of standards that made affirmative use of race. Ameliorating the effects of past discrimination would justify the remedial use of race, the Justice thought, when the entity itself had been found by appropriate authority to have discriminated, but the college could not inflict harm upon other groups in order to remedy past societal discrimination.[13.5] Justice Powell thus joined the first group in agreeing that Bakke should be admitted, but he joined the second group in permitting the college to consider race to some degree in its admissions.[14.5]

Finally, in *Fullilove* v. *Klutznick*,[15.5] the Court resolved most of the outstanding constitutional question regarding the validity of race-conscious affirmative action programs. Although again there was no majority opinion of the Court, the series of opinions by the six Justices voting to uphold a congressional provision requiring that at least ten percent of public works funds be set aside for minority business enterprises all recognized that alleviation and remediation of past societal discrimination was a legitimate goal and that race was a permissible clssification to use in remedying the present effects of past discrimination. Judgment of the Court was issued by Chief Justice Burger who emphasized Congress' preeminent role under the Commerce clause and under the Fourteenth Amendment to find as a fact the existence of past discrimination and its continuing effects and to implement remedies which were race conscious in order to cure those effects.[16.5] The principal concurring opinion by Justice Marshall applied the Brennan analysis in *Bakke*, utilizing the the middle-tier of scrutiny to hold that the race conscious set-aside was "substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past discrimination."[17.5]

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[12.5] Id., 355-379 (Justices Brennan, White, Marshall, and Blackmun). The intermediate standard of review adopted by the four Justices is that promulgated to be applied in gender cases. "Racial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.' " Id., 359.

[13.5] Id., 307-320.

[14.5] See id., 315-320 (Justice Powell).

[15.5] 448 U.S. 448 (1980). Justice Stewart, joined by Justice Rehnquist, dissented in one opinion, id., 522, while Justice Stevens dissented in another. Id., 532.

[16.5] Id., 456-492. Justices White and Powell joined this opinion. Justice Powell also concurred in a separate opinion, id., 495, which qualified so some extent his agreement with the Chief Justice.

[17.5] Id., 517.

Taken together, the opinions recognize that at least in Congress there resides the clear power to make the findings that will form the basis for a judgment of the necessity to use racial classifications in an affirmative way; these findings need not be extensive or express and may be collected in many ways. Whether federal agencies or state legislatures and state agencies have the same breadth and leeway to make findings and formulate remedies is left unsettled but that they have some such power seems evident.[18.5] Further, while the opinions emphasized the limited duration and magnitude of the set-aside program, they appeared to attach no constitutional significance to it, thus leaving the way open for programs of a scope sufficient to remedy all the identified effects of past discrimination.[19.5] But the most important part of these opinions rests in the clear sustaining of race classifications as permissible in remedies and in the approving of some forms of racial quotas. Rejected were the arguments respecting stigma attaching to those minority beneficiaries of such program, respecting the burdens on innocent third parties, and respecting the overinclusiveness arising from the fact that some minorities who had suffered no discrimination received the benefit of the remedies.[20.5]

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[18.5] Id., 473–480. The program was an exercise of Congress' spending power, but the constitutional objects raised had not been previously resolved in that context. The plurality therefore turned to Congress' regulatory powers, which in this case undergirded the spending power, and found the power to repose in the commerce clause with respect to private contractors and in § 5 of the Fourteenth Amendment with respect to state agencies. The Marshall plurality appeared to attach no significance in this regard to the fact that Congress was the acting party.

[19.5] Id., 484–485, 489 (Chief Justice Burger), 513–515 (Justice Powell).

[20.5] Id., 484–489 (Chief Justice Burger), 514–515 (Justice Powell), 520–521 (Justice Marshall).

## The New Equal Protection

### Alienage

**[P. 1508, following N. 8, in text, add:]**

After building a doctrine of alienage as a suspect classification requiring a compelling state interest to justify exclusions or disqualifications based on it, the Court has now created a major exception to the doctrine with the potential of replacing it altogether. It was only in 1971 that the Court pronounced state classifications[1.5] affecting aliens to be suspect and thus subject to strict scrutiny.[2.5] In succeeding Terms the Justices successively enlarged the protection to be accorded

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[1.5] Because of the plenary power delegated by the Constitution to the Federal Goverument to deal with aliens, federal classifications are judged by less demanding standards, *Mathews v. Diaz*, 426 U.S. 67 (1976); *Fiallo v. Bell*, 430 U.S. 787 (1977), although not every burden imposed will pass constitutional muster. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

[2.5] *Graham v. Richardson*, 403 U.S. 365 (1971) resident aliens who were either entitled or not yet entitled to United States citizenship and refused to permit treatment to be varied by whether citizenship was the ultimate goal of the alien.

In *Sugarman* v. *Dougall*,[3.5] the Court voided the total exclusion of aliens from a State's competitive civil service. A State's power "to preserve the basic conception of a political community" enables it to prescribe the qualifications of its officers and voters,[4.5] the Court held, and this power would extend "also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government."[5.5] But a flat ban upon much of the State's career public service, both of policy-making and non-policy-making jobs, ran afoul of the requirement that in achieving a valid interest through the use of a suspect classification the State must employ means that are precisely drawn in light of the valid purpose.[6.5]

State bars against the admission of aliens to the practice of law were also struck down, the Court holding that the State had not met the "heavy burden" of showing that its denial of admission to aliens was necessary to accomplish a constitutionally permissible and substantial interest. The State's admitted interest in assuring the requisite qualifications of persons licensed to practice law could be adequately served by judging applicants on a case-by-case basis and in no sense could the fact that a lawyer is considered to be an officer of the court serve as a valid justification for a flat prohibition.[7.5] Nor could Puerto Rico offer a justification for excluding aliens from one of the "common occupations of the community" and its bar on licensing aliens as civil engineers was voided.[8.5]

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[3.5] 413 U.S. 634 (1973).

[4.5] Id., 647–649. See also *Foley* v. *Connelie*, 435 U.S. 291, 296 (1978). Thus, aliens can be excluded from voting, *Skafte* v. *Rorex*, 553 P. 2d 830 (Colo. 1976), *app. dismd. for lack of substantial federal question*, 430 U.S. 961 (1977), and from service on juries. *Perkins* v. *Smith*, 370 F. Supp. 134 (D.C.D.Md. 1974) (3-judge court), *aff'd.* 426 U.S. 913 (1976).

[5.5] *Sugarman* v. *Dougall*, 413 U.S. 634, 647 (1973). Such state restrictions are "not wholly immune from scrutiny under the Equal Protection Clause." Id., 648.

[6.5] Justice Rehnquist dissented. Id., 649. In the course of the opinion, the Court held inapplicable the doctrine of special-public-interest, the idea that a State's concern with the restriction of the resources of the State to the advancement and profit of the citizens of that State is a valid basis for discrimination against out-of-state citizens and aliens generally, but it did not declare the doctrine invalid. Id., 643–645.

[7.5] *In re Griffiths*, 413 U.S. 717 (1973). Chief Justice Burger and Justice Rehnquist dissented. Id., 730, and 413 U.S., 649.

[8.5] *Examining Board* v. *Flores de Otero*, 426 U.S. 572 (1976). Since the jurisdiction was Puerto Rico, the Court was not sure whether the requirement should be governed by the Fifth or Fourteenth Amendment but deemed the question immaterial since the same result would be achieved. The quoted expression is from *Truax* v. *Raich*, 239 U.S. 33, 41 (1915).

In *Nyquist* v. *Mauclet*,[9.5] the Court seemed to expand the doctrine of the cases. Challenged was a statute that restricted the receipt of scholarships and similar financial support to citizens or to aliens who were applying for citizenship or who filed a statement affirming their intent to apply as soon as they became eligible. Under the circumstances, therefore, the disqualification was not aimed at aliens as a class and because any alien could escape the limitation by a voluntary act on his part the classification was not on an immutable characteristic possessed by a "discrete and insular minority" which was the basis for declaring alienage a suspect category. But the Court voided the statute. "The important points are that § 661(3) is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class."[10.5] Two proffered justifications were held insufficient to meet the high burden imposed by the strict scrutiny doctrine.

However, in the following Term, the Court denied that every exclusion of aliens was subject to strict scrutiny, "because to do so would 'obliterate all the distinctions between citizens and aliens, and thus deprecate the historic values of citizenship.'"[11.5] Upholding a state restriction against aliens qualifying as state policemen, the Court reasoned that the permissible distinction between citizen and alien is that the former "is entitled to participate in the processes of democratic decisionmaking. Accordingly, we have recognized 'a State's historic power to exclude aliens from participation in its democratic political institutions,' . . . as part of the sovereign's obligation '"to preserve the basic conception of a political community."'"[12.5] When a State acts thusly by classifying against aliens, its action is not subject to strict scrutiny but rather need only meet the rational basis test. It is therefore permissible to reserve to citizens offices having the "most important policy responsibilities", a reservation drawn from *Suger-*

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[9.5] 432 U.S. 1 (1977).

[10.5] Id., 9. Chief Justice Burger and Justices Powell, Rehnquist, and Stewart dissented. Id., 12, 15, 17. Justice Rehnquist's dissent argued that the nature of the disqualification precluded it from being considered suspect.

[11.5] *Foley* v. *Connelie*, 435 U.S. 291, 295 (1978). The opinion was by Chief Justice Burger and the quoted phrase was from his dissent in *Nyquist* v. *Mauclet*, 432 U.S. 1, 14 (1977). Justices Marshall, Stevens, and Brennan dissented. Id. 302, 307.

[12.5] Id., 295–296. Formally following *Sugarman* v. *Dougall*, *supra*, the opinion considerably enlarged the exception noted in that case; see also *Nyquist* v. *Mauclet*, 432 U.S. 1, 11 (1977) (emphasizing the "narrowness of the exception"). Concurring in *Foley*, *supra*, 300, Justice Stewart observed that "it is difficult if not impossible to reconcile the Court's judgment in this case with the full sweep of the reasoning and authority of some of our past decisions. It is only because I have become increasingly doubtful about the validity of those decisions (in at least some of which I concurred) that I join the opinion of the Court in this case." On the other hand, Justice Blackmun, who had written several of the past decisions, including *Mauclet*, concurred also, finding the cases consistent. Ibid.

*man*, but the critical factor in this case is the analysis finding that the police function is "one of the basic functions of government." "The execution of the broad powers vested" in police officers "affects members of the public significantly and often in the most sensitive areas of daily life. . . . Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals. The office of a policeman is in no sense one of 'the common occupations of the community'. . . ."[13.5]

Continuing to enlarge the exception, the Court in *Ambach* v. *Norwick*[14.5] upheld a bar to qualifying as a public school teacher for resident aliens who have not manifested an intention to apply for citizenship. The "governmental function" test took on added significance, the Court saying that the "distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State."[15.5] Thus, "governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens."[16.5] Teachers, the Court thought, because of the role of public education in inculcating civic values and in preparing children for participation in society as citizens and because of the responsibility and discretion they have in fulfilling that role, perform a task that "go[es] to the heart of representative government."[17.5] The citizenship requirement need only bear a rational relationship to the state interest and the Court concluded it clearly did so.

A differentiation has thus been drawn between private and public employment and with respect to the latter the test of permissibility of exclusion remains vague. Presumably, the "governmenal function" concept is elastic and in any event so long as disqualifications are attached to specific occupations rather than to the civil service in general, as in *Sugarman*, the concept seems capable of encompassing the exclusion.

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[13.5] Id., 297-298. In *Elrod* v. *Burns*, 427 U.S. 347 (1976), barring patronage dismissals of police officers, the Court had nonetheless recognized an exception for policymaking officers which it did not extend to the police.

[14.5] 441 U.S. 68 (1979). The opinion, by Justice Powell, was joined by Chief Justice Burger and Justices Stewart, White, and Rehnquist. Dissenting were Justices Blackmun, Brennan, Marshall, and Stevens. The disqualification standard was of course, that held invalid as a disqualification for receipt of educational assistance in *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977).

[15.5] *Ambach* v. *Norwick*, 441 U.S. 68, 75 (1979).

[16.5] Ibid.

[17.5] Id., 75-80. The quotation, at id., 76, is from *Sugarman* v. *Dougall*, 413 U.S. 634, 647 (1973).

## Illegitimacy

**[P. 1509, in text following final paragraph of section, add:]**

After wrestling with the question of the permissibility of governmental classifications disadvantaging illegitimates and the standard for determining which classifications are sustainable, the Court has arrived through decision in 17 cases since 1968 at a standard difficult to state and even more difficult to apply.[25] Although "illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis of statutory differentiations," the analogy is "not sufficient to require 'our most exacting scrutiny'." The scrutiny to which it is entitled "is not a toothless one," and is an intermediate one, somewhere between that accorded race and that accorded ordinary economic classifications. Basically, the standard requires a determination of a legitimate legislative aim and a careful review of how well the classification serves, or "fits," the aim.[26] The common rationale of all the illegitimacy cases is not clear, is in many respects not wholly consistent,[27] but the theme that seems to be imposed on them by the more recent cases is that so long as the challenged statute does not so structure its conferral of rights, benefits, or detriments that some illegitimates who would otherwise qualify in terms of the statute's legitimate purposes are disabled from participation, the imposition of greater burdens upon illegitimates or some classes of illegitimates than upon legitimates is permissible.[4.5]

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[25] Although the same standard applies whether the Fifth Amendment's due process clause or the Fourteenth Amendment's equal protection clause is the limiting provision, so that the Federal Government must observe the same neutrality of classification, at least where Congress' power over immigration is involved the standard of review is extremely deferential and otherwise impermissible classifications will be allowed. *Fiallo* v. *Bell*, 430 U.S. 787 (1977) (Fifth Amendment). Cf. *Mathews* v. *Diaz*, 426 U.S. 67 (1976) (Fifth Amendment).

[26] *Mathews* v. *Lucas*, 427 U.S. 495, 503-506 (1976) (Fifth Amendment); *Trimble* v. *Gordon*, 430 U.S. 762, 766-767 (1977); *Lalli* v. *Lalli*, 439 U.S. 259, 265 (1978). Scrutiny in previous cases had ranged from negligible, *Labine* v. *Vincent*, 401 U.S. 532 (1971), to something approaching strictness. *Jimenez* v. *Weinberger*, 417 U.S. 628, 631-632 (1974 (Fifth Amendment). *Mathews* itself illustrates the uncertainty of statement, suggesting at one point that the *Labine* standard may be appropriate, *supra*, 506, at another that the standard appropriate to gender classifications is to be used, id., 510, while observing a few pages earlier that illegitimacy is entitled to less exacting scrutiny than either race or *sex*. Id., 506. *Trimble* settles on intermediate scrutiny but does not assess the relationship between its standard and the gender classification standard. See *Parham* v. *Hughes*, 441 U.S. 347 (1979), and *Caban* v. *Mohammed*, 441 U.S. 380 (1979) (both cases involving classifications reflecting both gender and illegitimacy interests).

[27] The major inconsistency arises from three 5-to-4 decisions. *Labine* v. *Vincent*, 401 U.S. 532 (1971), largely overruled by *Trimble* v. *Gordon*, 430 U.S. 762 (1977), itself substantially limited by *Lalli* v. *Lalli*, 439 U.S. 259 (1978). In the latter two cases, eight Justices would have decided both the same way but Justice Powell applying a narrower approach than each set of four Justices governed the different disposition of each of the cases. Thus, while four Justices argue for stricter scrutiny and usually invalidation of such classifications, *Lalli* v. *Lalli*, *supra*, 277 (Justices Brennan, White, Marshall, and Stevens dissenting), and four favor relaxed scrutiny and usually sustaining of the classifications, *Trimble* v. *Gordon*, *supra*, 776, 777 (Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist dissenting), Justice Powell follows his own path of intermediate scrutiny and selective voiding-sustaining. *Lalli* v. *Lalli*, *supra*, (plurality opinion by Justice Powell).

Intestate succession rights for illegitimates has divided the Court over the entire period. At first adverting to the broad power of the States over descent of real property, the Court scrutinized very relaxedly and sustained a law denying illegitimates the right to share equally with legitimates in the estate of their common father who had acknowledged the illegitimates but who had died intestate, finding it well within the permissible scope of state powers.[5.5] *Labine* was strongly disapproved, however, and virtually overruled in *Trimble v. Gordon*,[6.5] which held a denial of equal protection a statute following illegitimate children to inherit by intestate succession from their mothers but from their fathers only if the father had "acknowledged" the child and the child had been legitimated by the marriage of the parents. The child in *Trimble* had not been acknowledged by her father nor had he married her mother, but he had been found by a judicial support decree to be in fact her father. Carefully assessing the purposes asserted to be the basis of the statutory scheme, the Court found all but one to be impermissible or inapplicable and that one not well suited to serve the purpose. First, it was impermissible to attempt to influence the conduct of adults not to engage in illicit sexual activities by visiting the consequences upon the off-spring.[7.5] Second, the assertion that the statute mirrored the assumed intent to decedents, in that, knowing of the statute's operation, they would have acted to counteract it through a will or otherwise, was rejected as unproved and unlikely.[8.5] Third, the argument that since decedent could have left a will, married the mother, or taken steps to legitimate her, and the statute would not have barred her, therefore the law presented no insurmountable barrier to illegitimates inheriting was rejected as inapposite.[9.5] Fourth, the statute did address the substantial problem, a permissible state interest, presented

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[4.5] A classification that absolutely distinguishes between legitimates and illegitimates is not alone subject to such review; one that distinguishes among classes of illegitimates is also subject to it, *Trimble v. Gordon*, 430 U.S. 762, 774 (1977), as indeed are classifications based on other factors. *E.g.*, *Nyquist v. Mauclet*, 432 U.S. 1 ,9 (1977) (alienage).

[5.5] *Labine v. Vincent*, 401 U.S. 532 (1971). *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 170 (1972), had confined the analysis of *Labine* to the area of state inheritance laws in expanding review of illegitimacy classifications.

[6.5] 430 U.S. 762, 766 n. 12, 769, 773–774, 776 n. 17 (1977). Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist dissented, find the statute "constitutionally indistinguishable" from the one sustained in *Labine*. Id., 776. Justice Rehnquist also dissented separately. Id., 777.

[7.5] Id., 768–770. While this purpose had been alluded to in *Labine v. Vincent*, 401 U.S. 532, 538 (1971), it was rejected as a justification in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 173, 175 (1972). Visiting consequences upon the parent appears to be permissible. *Parham v. Hughes*, 441 U.S. 347, 352–353 (1979).

[8.5] *Trimble v. Gordon*, 430 U.S. 762, 774–776 (1977). The Court cited the failure of the state court to rely on this purpose and its own examination of the statute.

by the difficulties of proving paternity and avoiding spurious claims. However, the court thought the means adopted, total exclusion, did not approach the "fit" necessary between means and ends to survive the scrutiny appropriate to this classification. The state court was criticized for failing "to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws."[10.5] Because the state law did not follow a reasonable middle ground, it was invalidated.

A reasonable middle ground was discerned, at least by Justice Powell, in *Lalli* v. *Lalli*,[11.5] concerning a statute which permitted legitimate children to inherit automatically from both their parents and to inherit automatically from their mothers, but to inherit from their intestate fathers only if a court of competent jurisdiction had, during the father's lifetime, entered an order declaring paternity. The child tendered evidence of paternity, including a notarized document in which the putative father, in consenting to his marriage, referred to him as "my son" and several affidavits by persons who stated that the elder Lalli had openly and frequently acknowledged that the younger Lalli was his child. In the prevailing view, the single requirement of entry of a court order during the father's lifetime declaring the child as his met the "middle ground" requirement of *Trimble;* it was addressed closely and precisely to the substantial state interest of seeing to the orderly disposition of property at death by establishing proof of paternity of illegitimate children and avoiding spurious claims against intestate estates. To be sure, some illegitimates who were unquestion-

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[9.4] Id., 773–774. This justification had been prominent in *Labine* v. *Vincent*, 401 U.S. 532, 539 (1971), and its absence had been deemed critical in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 170–171 (1972). The *Trimble* Court thought this approach "somewhat of an analytical anomaly" and disapproved it. However, the degree to which one could conform to the statute's requirements and the reasonableness of those requirements in relation to a legitimate purpose are prominent in Justice Powell's reasoning in subsequent cases. *Lalli* v. *Lalli*, 439 U.S. 259, 268–274 (1978); *Parham* v. *Hughes*, 441 U.S. 347, 359 (1979) (Justice Powell concurring); See also *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977) (alienage).

[10.5] *Trimble* v. *Gordon*, 430 U.S. 762, 770–773 (1977). The result is in effect a balancing one, the means-ends relationship must be a substantial one in terms of the advantages of the classification as compared to the harms of the classification means. Justice Rehnquist's dissent is especially critical of this approach. Id., 777, 781–786.

[11.5] 439 U.S. 259 (1978). The four *Trimble* dissenters joined Justice Powell in the result, although only two joined his opinion. Justices Blackmun and Rehnquist concurred because they thought *Trimble* wrongly decided and ripe for overruling. Id., 276. The four dissenters, who had joined the *Trimble* majority with Justice Powell, thought the two cases were indistinguishable. Id., 277.

ably established as children of the deceased would be disqualified because of failure of compliance but individual fairness is not the test, rather whether the requirement is closely enough related to the interests served to meet the standard of rationality imposed is the test. Also, no doubt the State's interest could have been served by permitting other kinds of proof but that too is not the test of the statute's validity. Hence, the balancing necessitated by the Court's promulgation of standards in such cases caused it closely in both cases to come to different results on closely related fact patterns, making the process of predictability quite difficult but perhaps manageable.[12.3]

Aside from the area of descent of property, the Court has also faced difficulty arriving at predictable results. Thus, a Texas child support law affording legitimate children a right to judicial action to obtain support from their fathers while not affording the right to illegitimate children denied the latter equal protection. "A State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers *there is no constitutionally sufficient justification* for denying such an essential right to a child simply because its natural father has not married its mother."[12.4]

Similarly, a federal Social Security provision was held invalid which made eligible for benefits, because of an insured parent's disability, all legitimate children as well as those illegitimate children capable of inheriting personal property under state intestacy law and those children who were illegitimate only because of a nonobvious defect in their parents' marriage, regardless of whether they were born after the onset of the disability, but which made all other illegitimate children eligible only if they were born prior to the onset of disability and if they were dependent upon the parent prior to the onset of disability. The Court deemed the purpose of the benefits to be to aid all children and rejected the argument that the burden on illegitimates was necessary to avoid fraud.[12.5]

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[12.3] Illustrating the difficulty are two cases in which the fathers of illegitimate children challenged statutes treating them differently than mothers of such children were treated. In *Parham* v. *Hughes*, 441 U.S. 347 (1979), the majority viewed the distinction as a gender-based one rather than as an illegitimacy classification and sustained a bar to the father of an illegitimate child suing for his wrongful death if he had not legitimated him; in *Caban* v. *Mohammed*, 441 U.S. 380 (1979), again viewing the distinction as a gender-based one, the majority voided a state law permitting the mother but not the father of an illegitimate child to block his adoption by refusing to consent. Both decisions were 5-to-4.

[12.4] *Gomez* v. *Perez*, 409 U.S. 535, 538 (1973) (emphasis supplied).

[12.5] *Jimenez* v. *Weinberger*, 417 U.S. 628 (1974) (Fifth Amendment). But compare *Califano* v. *Boles*, 443 U.S. 282 (1979) (Fifth Amendment). See also *New Jersey Welfare Rights Org.* v. *Cahill*, 411 U.S. 619 (1973) (limiting welfare assist-

However, in a second case, an almost identical program, providing benefits to children of a deceased insured, was sustained because its purpose was found to be to given benefits to children who were dependent upon the deceased parent and the classifications served that purpose. Presumed dependent were all legitimate children as well as those illegitimate children who were able to inherit under state intestacy laws, who were illegitimate only because of the technical invalidity of the parents' marriage, who had been acknowledged in writing by the father, who had been declared to be the father's by a court decision, or who had been held entitled to the father's support by a court. Illegitimate children not covered by these presumptions had to establish that they were living with the insured parent or were being supported by him when the parent died. According to the Court, all the presumptions constituted an administrative convenience which was a permissible device because those illegitimate children who were entitled to benefits because they were in fact dependent would receive benefits upon proof of the fact and it was irrelevant that other children not dependent in fact also received benefits.[15.8]

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ance to households in which parents are ceremonially married and the children are legitimate or adopted denied illegitimate children equal protection); *Richardson v. Davis*, 409 U.S. 1069 (1972), *aff'g.* 342 F. Supp. 588 (D.C.D. Conn.) (3-judge court), and *Richardson v. Griffin*, 409 US. 1069 (1272), *aff'g.* 346 F. Supp. 1226 (D.C.D.Md.) (3-judge court) (Social Security provision entitling illegitimate children to monthly benefit payments only to extent that payments to widow and legitimate children do not exhaust benefits allowed by law denies illegitimates equal protection).

[15.8] *Mathews v. Lucas*, 427 U.S. 495 (1976) (Fifth Amendment). It can be seen that the only difference between *Jiminez* and *Lucas* is that in the former the Court viewed the benefits owing to all children and not just to dependents, while in the latter the benefits were viewed as owing only to dependents and not to all children. But it is not clear that in either case the purpose determined to underlay the provision of benefits was compelled by either statutory language or legislative history. For a particularly good illustration of the difference such a determination of purpose can make and the way the majority and dissent in a 5-to-4 decision read differently the purpose, see *Califano v. Boles*, 443 U.S. 282 (1979).

### Sex

**[P. 1510, add to N. 17:]**

For cases interpreting the statutory ban on employment discrimination on the basis of sex, see *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978), and on the relationship of sex and pregnancy classifications, see *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), responded to in Pregnancy Discrimination Act, P.L. 95-555 (1978), 92 Stat. 2076, amending 42 U.S.C. § 2000e. On the Equal Pay Act, see *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

**[P. 1511, in text following N. 23, add:]**

Gender classifications, in order to withstand equal protection scrutiny, "must serve important governmental objectives and must be substantially related to achievement of those objectives."[18] Thus, after several years in which sex distinctions were more often voided than sustained without a clear statement of the standard of review,[19] a majority of the Court has arrived at the intermediate standard which many had thought it was applying in any event.[20] It appears that in gender classification cases, the Court will examine the statutory or administrative scheme to determine if the purpose or objective is permissible and if it is whether it is important and, then, having ascertained the actual motivation of the classification, it will engage in a balancing test to determine how well the classification serves the end and whether a less discriminatory one would serve that end without substantial loss to the government.[67]

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[18] *Craig* v. *Boren*, 429 U.S. 190, 197 (1976); *Califano* v. *Goldfarb*, 430 U.S. 199, 210–211 (1977) (plurality opinion) (Fifth Amendment); *Califano* v. *Webster*, 430 U.S. 313, 316–317 (1977) (Fifth Amendment); *Orr* v. *Orr*, 440 U.S. 268, 279 (1979); *Caban* v. *Mohammed*, 441 U.S. 380, 388 (1979); *Massachusetts Personnel Admr.* v. *Feeney*, 442 U.S. 256, 273 (1979); *Califano* v. *Westcott*, 443 U.S. 76, 85 (1979); *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980). The test is the same whether women or men are disadvantaged by the classification, *Orr* v. *Orr*, *supra*, 279, although Justice Rehnquist and Chief Justice Burger have strongly argued that when males are disadvantaged only the rational basis test is appropriate. *Craig* v. *Boren*, *supra*, 217, 218–221; *Califano* v. *Goldfarb*, *supra*, 224. That adoption of a standard has not made easy the Court's problem of deciding gender cases should be evident by perusal of the cases following. The difficulty is further illustrated in *Vorchheimer* v. *School Dist. of Philadelphia*, 430 U.S. 703 (1977), *aff'g by an equally divided Court*, 532 F. 2d 880 (C.A. 3, 1976) (maintenance of two single-sex high schools of equal educational offerings did not deny equal opportunity to female student desiring admission to male school) (Justice Rehnquist not participating).

[19] In *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), four Justices were prepared to hold that gender classifications are inherently suspect and must therefore be subjected to strict scrutiny. Id., 684–687 (Justices Brennan, Douglas, White, and Marshall). Three Justices, reaching the same result, thought the statute failed the traditonal test and declined for the moment to consider whether gender was a suspect classifications, finding that inappropriate while the Equal Rights Amendment was pending. Id., 691 (Justices Powell and Blackmun and Chief Justice Burger). Justice Stewart found the statute void under traditional scrutiny and Justice Rehnquist dissented. Id., 691.

[20] While their concurrences in *Craig* v. *Boren*, 429 U.S. 190, 210, 211 (1976), indicate some reticence about express reliance on intermediate scrutiny, Justices Powell and Stevens have since joined or written opinions stating the test and applying it. E.g., *Caban* v. *Mohammed*, 441 U.S. 380, 388 (1979) (Justice Powell writing the opinion of the Court); *Parham* v. *Hughes*, 441 U.S. 347, 359 (1979) (Justice Powell concurring); *Califano* v. *Goldfarb*, 430 U.S. 199, 217 (1977) (Fifth Amendment) (Justice Stevens concurring); *Caban* v. *Mohammed*, *supra*, 401 (Justice Stevens dissenting). Justice Stewart has stated the test in an opinion for the Court, *Massachusetts Personnel Admr.* v. *Feeney*, 442 U.S. 256, 273 (1979), but he has qualified his adherence by relying in other cases on whether men and women are "similarly situated" in respect to burdens or benefits. *Parham* v. *Hughes*, *supra*, 353–357 (opinion of the Court); *Caban* v. *Mohammed*, *supra*, 394 (Justice Stewart dissenting). Chief Justice Burger and Justice Rehnquist have not clearly stated a test although their deference to legislative judgment approaches the traditional scrutiny test. But see *Califano* v. *Westcott*, *supra*, 93 (joining Court on substantive decision).

Some gender distinctions were seen to be based solely upon "old notions" about the respective roles of the sexes in society which were no longer valid if ever they were and those distinctions failed to survive even traditional scrutiny. Thus, a state law defining the age of majority as 18 for females and 21 for males, entitling the male child to support by his divorced father for three years longer than the female child, was deemed merely irrational, grounded as it was in the assumption of the male as the breadwinner, needing longer to prepare, and the female as suited for wife and mother.[68] Similarly, a state jury selection system that in effect excluded almost all women was deemed to be based upon an overbroad generalization about the role of women as a class in society and the administrative convenience served could not justify it.[69]

Assumptions with respect to the relative positions of the sexes, however, are not without some basis in fact and sex may sometimes be a reliable proxy for the characteristic, such as need, with which it is the legislature's actual intention to deal. But heightened scrutiny requires evidence of the existence of the fact and its close correspondence with the condition for which sex stands as proxy. Thus, in the case which first expressly announced the intermediate scrutiny standard, the Court struck down a state statute that prohibited the sale of "nonintoxicating" 3.2 beer to males under 21 and to females under 18.[70] Accepting the argument that traffic safety was an important governmental objective, the Court emphasized that gender is an often inaccurate proxy for other, more germane classifications. Taking the statistics offered by the State as of value, while cautioning that statistical analysis is a "dubious" business that is in tension with the "normative philosophy that underlies the Equal Protection Clause," the Court thought the correlation between males and females arrested for drunk driving showed an unduly tenuous fit to allow the use of gender as a distinction.[illegible]

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[67] The test is thus the same as is applied to illegitimacy classifications, although with apparently more rigor when gender is involved. *Supra*, p. 1572 n. 25.

[68] *Stanton* v. *Stanton*, 421 U.S. 7 (1975). See also *Stanton* v. *Stanton*, 429 U.S. 501 (1977). Assumptions about the traditional roles of the sexes afford no basis for support of a gender classification under the intermediate scrutiny standard. E.g., *Orr* v. *Orr*, 440 U.S. 268, 279-280 (1979); *Parham* v. *Hughes*, 441 U.S. 347, 355 (1979). Justice Stevens in particular has been concerned whether legislative classifications by gender simply reflect traditional ways of thinking or is the result of a reasoned attempt to reach some neutral goal, e.g., *Califano* v. *Goldfarb*, 430 U.S. 199, 222-223 (1977) (concurring), and he will sustain some otherwise impermissible distinctions if he finds the legislative reasoning to approximate the latter approach. *Caban* v. *Mohammed*, 441 U.S. 380, 401 (1979) (dissenting).

[69] *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). The precise basis of the decision was the Sixth Amendment right to a representative cross section of the community, but the Court dealt with and disapproved the reasoning in *Hoyt* v. *Florida*, 368 U.S. 57 (1961), in which a similar jury selection process was upheld against due process and equal protection challenge.

[70] *Craig* v. *Boren*, 429 U.S. 190 (1976).

Invalidating an Alabama law imposing alimony obligations upon males but not upon females, the Court acknowledged that assisting needy spouses was a legitimate and important governmental objective and would then have turned to ascertaining whether sex was a sufficiently accurate proxy for dependency so that it could be said that the classification was substantially related to achievement of the objective.[illegible] However, the Court observed that the State already conducted individualized hearings with respect to the need of the wife, so that with little additional burden needy males could be identified and helped. The use of the gender standard as a proxy, therefore, was not justified because it needlessly burdened needy men and advantaged financially secure women whose husbands were in need.[illegible]

Differentiation between unwed mothers and unwed fathers received different treatments through the Court's perception of the justifications and presumptions underlying each. A New York law permitted the unwed mother but not the unwed father of an illegitimate child to block his adoption by withholding consent. Acting in the instance of one who acknowledged his parenthood and had maintained a close relationship with the child over the years, the Court could discern no substantial relationship to some important interest of the classification. Promotion of adoption of illegitimates and their consequent legitimation was important, but the assumption that all unwed fathers either stood in a different relationship to their children than did the unwed mother or that the difficulty of finding the fathers would unreasonably burden the adoption process was overbroad as the facts of the case revealed. No barrier existed to the State dispensing with consent when the father is unknown or his location is unknown, but disqualification of all unwed fathers may not be used as a short-

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[illegible] Id., 198, 199-200, 201-202, 204.

[illegible] *Orr* v. *Orr*, 440 U.S. 268 (1979).

[illegible] Id., 280-283. An administrative convenience justification was not available, therefore, id., 281 & n. 12. While such an argument has been accepted as a sufficient justification in at least some illegitimacy cases, *Mathews* v. *Lucas*, 427 U.S. 495, 509 (1976), it has neither wholly been ruled out nor accepted in gender cases. In *Lucas*, *supra*, 509-510, the Court interpreted *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), as having required a showing at least that for every dollar lost to a recipient not meeting the general purpose qualification a dollar is saved in administrative expense. In *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 152 (1980) the Court said that "[i]t may be that there are levels of administrative convenience that will justify discriminations that are subject to heightened scrutiny . . ., but the requisite showing has not been made here by the mere claim that it would be inconvenient to individualize determinations about widows as well as widowers." Justice Stevens would appear to demand a factual showing of substantial savings. *Califano* v. *Goldfarb*, 430 U.S. 199, 219 (1977) (concurring).

hand for that step.[11.5] On the other hand, the Court sustained a Georgia statute which permitted the mother of an illegitimate child to sue for the wrongful death of the child but which allowed the father to sue only if he has legitimated the child and there is no mother.[12.5] There was no opinion of the Court but both opinions making up the result emphasized that the objective of the State, the avoidance of difficulties in proving paternity, was an important one which was advanced by the classification.[13.5]

As in the instance of illegitimacy classifications, gender qualifications for the receipt of governmental financial benefits has divided the Court and occasioned close distinctions. A statutory scheme under which a serviceman could claim his spouse as a "dependent" for allowances while a servicewoman's spouse was not considered a "dependent" unless he was shown in fact to be dependent upon her for more than one half of his support was held an invalid dissimilar treatment of men and women who are similarly situated not justified by the administrative convenience rationale.[14.5] In *Weinberger* v. *Wiesenfeld*,[15.5] the Court struck down a Social Security provision that gave survivors' benefits based on the insured earnings to the widow and minor children but gave such benefits only to the children and not to the widower of a deceased woman worker. Focusing not only upon the discrimination against the widower but primarily upon the discrimination visited upon the woman worker whose earnings did not provide the same support for her family that a male worker's did, the Court saw the basis for the distinction resting upon the generalization that a woman would stay home and take care of the children while a man would not. Since the Court perceived the purpose of the provision to be to enable the surviving parent to choose to remain at home to care for minor children, the gender classification ill fitted the end and was invidiously discriminatory.

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[11.5] *Caban* v. *Mohammed*, 441 U.S. 380 (1979). Four Justices dissented. Id., 394 (Justice Stewart), 401 (Justices Stevens and Rehnquist and Chief Justice Burger). For the conceptually different problem of classification between different groups of women on the basis of marriage or absence of marriage to a wage earner at a particular point, see *Califano* v. *Boles*, 443 U.S. 282 (1979) (Fifth Amendment).

[12.5] *Parham* v. *Hughes*, 441 U.S. 347 (1979). Justices White, Brennan, Marshall, and Blackmun, who had been in the majority in *Caban*, dissented. Id., 361.

[13.5] The plurality opinion determined that the statute did not invidiously discriminate against men as a class; it was no overbroad generalization but proceeded from the fact that only men could legitimate children by unilateral action. The sexes were not similarly situated, therefore, and the classification recognized that. The means thus needed only to be a rational way of dealing with the problem of proving paternity. Id., 353–358. Justice Powell found the statute valid because the gender-based classification was substantially related to the objective of avoiding problems of proof in proving paternity. He also emphasized that the father had it within his power to remove the bar by legitimating the child. Id., 359.

[14.5] *Frontiero* v. *Richardson*, 411 U.S. 677 (1973) (Fifth Amendment).

[15.5] 420 U.S. 636 (1975) (Fifth Amendment).

But when in *Califano* v. *Goldfarb*[16.5] the Court was confronted with a Social Security provision structured much as the benefit sections struck down in *Frontiero* and *Wiesenfeld*, even in the light of an express heightened scrutiny, no majority of the Court could be obtained in striking down the statute. The section provided that a widow was entitled to receive survivors' benefits based on the earnings of her deceased husband, regardless of dependency, but payments were to go to the widower of a deceased wife only upon proof that he had been receiving at least half of his support from her. The plurality opinion treated the discrimination as consisting of disparate treatment of women wage-earners whose tax payments did not earn the same family protection as male wage earners' taxes. Looking to the purpose of the benefits provision, the plurality perceived it to be protection of the familial unit rather than of the individual widow or widower and to be keyed to dependency rather than need. The gender classification was thus found to be based on an assumption of female dependency which ill-served the purpose of the statute and was an ill-chosen proxy for the underlying qualification. Administrative convenience could not justify use of such a questionable proxy.[17.5] Justice Stevens, concurring, accepted most of the analysis of the dissent but nonetheless came to be conclusion of invalidity. His argument was essentially that while either administrative convenience or a desire to remedy discrimination against female spouses could justify use of a gender classification neither purpose was served by the gender classification actually used in this statute.[18.5]

Cases of "benign" discrimination, that is, statutory classifications that benefit women and disadvantage men in order to overcome the effects of past societal discrimination against women, have presented the Court with some difficulty. Although the first two cases were reviewed under apparently traditional rational basis scrutiny, the more recent cases appear to subject these classifications to the same interme-

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[16.5] 430 U.S. 199 (1977) (Fifth Amendment). The dissent argued that whatever the classification utilized, social insurance programs should not automatically be subjected to heightened scrutiny but rather only to traditional rationality review. Id., 224 (Justice Rehnquist with Chief Justice Burger and Justices Stewart and Blackmun). Only Justice Rehnquist continues to adhere to this view in this area, although the others may have yielded only to precedent. See *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980) (voiding a state workers' compensation provision identical to that voided in *Goldfarb*).

[17.5] Id., 430 U.S. 204–209, 212–217 (Justices Brennan, White, Marshall, and Powell).

[18.5] Id., 217. Justice Stevens adhered to this view in *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 154 (1980). Note the unanimity of the Court on the substantive issue, although it was divided on remedy, in voiding in *Califano* v. *Westcott*, 443 U.S. 76 (1979) (Fifth Amendment), a Social Security provision giving benefits to families with dependent children who have been deprived of parental support because of the unemployment of the father but giving no benefits when the mother is unemployed.

diate standard as any other gender classification. *Kahn* v. *Shevin*[19.5] upheld a state property tax exemption allowing widows but not widowers a $500 exemption. In justification, the State had presented extensive statistical data showing the substantial economic and employment disabilities of women in relation to men. The state provision, the Court found, was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden."[20.5] And in *Schlesinger* v. *Ballard*,[21.5] the Court sustained a provision requiring the mandatory discharge from the Navy of a male officer who has twice failed of promotion to certain levels, which in Ballard's case meant discharge after nine years of service, whereas women officers were entitled to 13 years of service before mandatory discharge for want of promotion. The difference was held to be a rational recognition of the fact that male and female officers were dissimilarly situated and that women had far fewer promotional opportunities than men had.

Although in each of these cases the Court accepted the proffered justification of remedial purpose without searching inquiry, later cases caution that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[22.5] Rather, after specifically citing the heightened scrutiny that all gender classifications are subjected to, the Court looks to the statute and to its legislative history to ascertain that the scheme does not actually penalize women, that it was actually enacted to compensate for past discrimination, and that it does not reflect merely "archaic and overbroad generalizations" about women in its moving force. But where a statute is "deliberately enacted to compensate for particular economic disabilities suffered by women", it serves an important governmental objective and will be sustained if it is substantially related to achievement of that objective.[23.5]

Another area presenting some difficulty is that of the relationship of pregnancy classifications to gender discrimination. In *Cleve-*

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[19.5] 416 U.S. 351 (1974).

[20.5] Id., 355.

[21.5] 419 U.S. 498 (1975).

[22.5] *Weinberger* v. *Wisenfeld*, 420 U.S. 636, 648 (1975); *Califano* v. *Goldfarb*, 430 U.S. 199, 209 n. 8 (1977); *Orr* v. *Orr*, 440 U.S. 268, 280-282 (1979); *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 150–152 (1980). In light of the stiffened standard, Justice Stevens has called for overruling *Kahn*, *Califano* v. *Goldfarb*, *supra*, 223-224, but Justice Blackmun would preserve that case. *Orr* v. *Orr*, *supra*, 284. Cf. *Regents of the Univ. of California* v. *Bakke*, 438 U.S. 265, 302-303 (1978) (Justice Powell; less stringent standard of review for benign sex classifications).

[23.5] *Califano* v. *Webster*, 430 U.S. 313, 316–318, 320 (1977) (Fifth Amendment). There was no doubt that the provision sustained in *Webster* had been adopted expressly to relieve past societal discrimination. The four *Goldfarb* dissenters concurred specially, finding no difference between the two provisions. Id., 321.

*land Board of Education* v. *LaFluer*,[21.5] a case decided upon due process grounds, two school systems requiring pregnant school teachers to leave work four and five months respectively before the expected childbirths were found to have acted arbitrarily and irrationally in establishing rules not supported by anything more weighty than administrative convenience buttressed with some possible embarrassment of the school boards in the face of pregnancy. On the other hand, the exclusion of pregnancy from a state financed program of payments to persons disabled from employment was upheld against equal protection attack as supportable by legitimate state interests in the maintenance of a self-sustaining program with rates low enough to permit the participation of low-income workers at affordable levels.[22.5] The absence of supportable reasons in one case and their presence in the other may well have made the significant difference.

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[21.5] 414 U.S. 632 (1974). Justice Powell concurred on equal protection grounds. Id., 651. See also *Turner* v. *Dept. of Employment Security*, 423 U.S. 44 (1975).

[22.5] *Geduldig* v. *Aiello*, 417 U.S. 484 (1974). The Court denied that the classification was based upon "gender as such." Classification was on the basis of pregnancy and while only women can become pregnant the fact alone was not determinative. "The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." Id., 496 n. 20. For a rejection of a similar attempted distinction, see *Nyquist* v. *Mauclet*, 432 U.S. 1, 9 (1977); *Trimble* v. *Gordon*, 430 U.S. 762, 774 (1977). See also *Phillips* v. *Martin-Marietta Corp.*, 400 U.S. 542 (1971). For the transmutation of *Geduldig* into statutory interpretation and Congress' response, see *supra, p. S276*.

## Fundamental Interests: The Political Process

### [P. 1513, add to N. 6:]

*Hill* v. *Stone*, 421 U.S. 289, 297 (1975), now states the applicable rule. "The basic principle . . . is that as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest." But see *Holt Civic Club* v. *City of Tuscaloosa*, 439 U.S. 60 (1978).

### [P. 1513, add to the final paragraph of the page:]

A 50-day durational residency requirement was sustained in the context of the closing of the registration process at 50 days prior to elections and of the mechanics of the State's registration process. The period, the Court found, was necessary to achieve the State's legitimate goals.[1.8]

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[1.8] *Marston* v. *Lewis*, 410 U.S. 679 (1973). Registration was by volunteer workers who made statistically significant errors requiring corrections by county recorders before certification. Primary elections were held in the fall, thus occupying the time of the recorders, so that a backlog of registrations had to be processed before the election. A period of 50 days rather than 30, the Court thought, was justifiable. However, the same period was upheld for another State on the authority of *Marston* in the absence of such justification, but it appeared that plaintiffs had not controverted the State's jusifying evidence. *Burns* v. *Fortson*, 410 U.S. 686 (1973). Justices Brennan, Douglas, and Marshall dissented in both cases, Id., 682, 688.

**[P. 1514, add to N. 12:]**

*Hill* v. *Stone*, 421 U.S. 289 (1975), struck down a limitation on the right to vote on a general obligation bond issue to persons who have "rendered" or listed real, mixed, or personal property for taxation in the election district. It was not a "special interest" election since a general obligation bond issue is a matter of general interest. The justifications offered were held insufficient.

**[P. 1514, add to text following N. 12:]**

However, the Court held that because the activities of a water storage district fell so disproportionately on landowners as a group, a limitation of the franchise in elections for the district's board of directors to landowners, whether resident or not and whether natural persons or not, excluding non-landowning residents and lessees of land, and weighing the votes granted according to assessed valuation of land, comported with equal protection standards.[2.5] Adverting to the reservation in prior local governmental unit election cases [3.5] that some functions of such units might be so specialized as to permit deviation from the usual rules, the Court then proceeded to assess the franchise restrictions according to the traditional standards of equal protection rather than by those of strict scrutiny.[4.5] Also narrowly approached was the issue of the effect of the District's activities, the Court focusing upon the assessments against landowners as the sole means of paying expenses rather than additionally noting the impact upon lessees and non-landowning residents of such functions as flood control. The approach taken in this case seems different in great degree from that in prior cases and could in the future alter the results in other local government cases.

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[2.5] *Salyer Land Co.* v. *Tulare Water Storage District*, 410 U.S. 719 (1973). See also *Associated Enterprises* v. *Toltec Watershed Imp. Dist.*, 410 U.S. 743 (1973) (limitation of franchise to property owners in the creation and maintenance of district uphold). Justices Douglas, Brennan, and Marshall dissented in both cases. Id., 735, 745.

[3.5] 410 U.S., 727–728.

[4.5] Id., 730, 732. Thus, the Court posited reasons that might have moved the legislature to adopt the exclusions.

**[P. 1514, in text following N. 14, add:]**

Absentee balloting by unconvicted jail inmates and convicted misdemeanants under no disability remains an open constitutional issue,[5.5] but the Court has sustained the disqualification from suffrage

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[5.5] In *Goosby* v. *Osser*, 409 U.S. 512 (1973), the Court unanimously held that *McDonald* did not preclude a challenge to the absolute prohibition of the right to vote by persons confined in jail awaiting trial and remanded the case for a hearing before a three-judge court. Subsequently, the Court held unconstitutional as interpreted a statute denying absentee registration and voting rights to persons confined in jail awaiting trial or serving misdemeanor sentences, but it is unclear whether the holding is premised on the fact that persons confined in jails outside the county of their residence could register and vote of persons convicted of "infamous crimes" who have served their sentences or completed their terms of parole, the Court relying upon an implied recognition of the validity of such disqualification in § 2 of the Fourteenth Amendment.[6.5]

Finding that prevention of "raiding"—the practice whereby voters in sympathy with one party vote in another's primary election in order to distort that election's results—is a legitimate and valid state goal, as one element in the preservation of the integrity of the electoral process, the Court sustained a state law requiring those voters eligible at that time to register to enroll in the party of their choice at least 30 days before the general election in order to be eligible to vote in the party's next primary election, 8 to 11 months hence. The law did not impose a prohibition upon voting but merely imposed a time deadline for enrollment, the Court held, and it was because of the plaintiffs' voluntary failure to register that they did not meet the deadline.[7.5] But a law which prohibited a person from voting in the primary election of a political party if he has voted in the primary election of any other party within the preceding 23 months was subjected to strict scrutiny and was voided, inasmuch as it constituted a severe restriction upon a voter's right to associate with the party of his choice by requiring him to forego participation in at least one primary election in order to change parties.[8.5]

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by absentee process while those confined in the county of their residence could not or whether the statute's jumbled distinctions among categories of qualified voters upon no rational standard made it wholly arbitrary in any event. *O'Brien v. Skinner*, 414 U.S. 524 (1974). The concurrence of Justices Marshall, Douglas, and Brennan indicates that the basic issue was not resolved. Id., 531. Justices Blackmun and Rehnquist dissented. Id., 535. See *American Party of Texas v. White*, 415 U.S. 767, 795 (1974).

[6.5] *Richardson v. Ramirez*, 418 U.S. 24 (1974). The Court undertook no survey of the justifications for such disqualifications as required by prior cases, saying rather that "the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2, and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court." Id., 54. Justices Marshall and Brennan dissented, id., 56, as did Justice Douglas. Id. 86.

[7.5] *Rosario v. Rockefeller*, 410 U.S. 752 (1973). Justices Powell, Douglas, Brennan, and Marshall dissented. Id., 763.

[8.5] *Kusper v. Pontikes*, 414 U.S. 51 (1973). Justices Blackmun and Rehnquist dissented. Id., 61, 65.

**[P. 1515, add to N. 15:]**

See also *Chappelle v. Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977) (holding void on the authority of *Turner v. Fouche* a qualification for appointment as airport commissioner of ownership of property, real or personal, that is assessed for taxes in the jurisdiction in which the airport is located).

**[P. 1515, add to text following N. 17:]**

Recognizing the state interest in maintaining a ballot of reasonable length in order to promote rational voter choice, the Court observed nonetheless that filing fees alone do not test the genuineness of a candidacy or the extent of voter support for an aspirant. Therefore, effectuation of the legitimate state interest must be achieved by means that do not unfairly or unnecessarily burden the party's or the candidate's "important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance." "[T]he process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars." [9.5] In the absence of reasonable alternative means of ballot access, the Court held, a State may not require from an indigent candidate filing fees he cannot pay.[10.5] Nor is it permissible to condition ballot access upon a political party's willingness to subscribe to an oath that the party "does not advocate the overthrow of local, state or national government by force or violence." [11.5]

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[9.5] *Lubin v. Panish*, 415 U.S. 709, 716 (1974).

[10.5] Concurring, Justices Blackmun and Rehnquist suggested that a reasonable alternative would be to permit indigents to seek write-in votes without paying a filing fee, id., 722, but the Court indicated this would be inadequate. Id., 719 n. 5.

[11.5] *Indiana Communist Party v. Whitcomb*, 414 U.S. 441 (1974). Basis of the decision was the First Amendment with four Justices concurring on equal protection grounds. Id., 451.

**[P. 1516, in text following N. 20, add:]**

Reviewing under the strict test, that requires that validity turn upon a showing that restrictions upon access to the ballot are necessary to further compelling state interests, the requirements for qualification of new parties and independent candidates for ballot positions, the Court recognized as valid objectives and compelling interests the protection of the integrity of the nominating and electing process, the promotion of party stability, and the assurance of a modicum of order in regulating the size of the ballot by requiring a showing of some degree of support for independents and new parties before they can get on the ballot.[12.5] "[T]o comply with the First and Fourteenth Amendments the State must provide a feasible opportunuity for new political organizations and their candidates to

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[12.5] *Storer v. Brown*, 415 U.S. 724 (1974); *American Party of Texas v. White*, 415 U.S. 767 (1974); *Illinois State Bd. of Elec. v. Socialist Workers Party*, 440 U.S. 173 (1979). It is now plain that the suggestion in the *text, p. 1516 n. 20*, of difference of treatment of voter qualifications and candidate qualification has not survived Court scrutiny. Compare *Storer v. Brown* with *Rosario v. Rockefeller*, 410 U.S. 752 (1973).

appear on the ballot."[13.5] Decision whether or not a state statutory structure affords a feasible opportunity is a matter of degree, "very much a matter of 'consider[ing] the facts and circumstances behind the law, the interest which the State claims to be protecting, and the interest of those who are disadvantaged by the classification.' "[14.5]

Thus, in order to assure that parties seeking ballot space command a significant, measurable quantum of community support, Texas was upheld in treating different parties in ways rationally constructed to achieve this objective. Candidates of parties whose gubernatorial choice polled more than 200,000 votes in the last general election must be nominated by primary elections and go on the ballot automatically, because the prior vote adequately demonstrates support. Candidates whose parties polled less than 200,000 but more than 2 percent may be nominated in primary elections or in conventions. Candidates of parties not coming within either of the first two must be nominated in conventions and may obtain ballot space only if the notarized list of participants at the conventions total at least one percent of the total votes cast for governor in the last preceding general election or, failing this, if in the 55 succeeding days a requisite number of qualified voters sign petitions to bring the total up to one percent of the gubernatorial vote. "[W]hat is demanded may not be so excessive or impractical as to be in reality a mere device to always, or almost always, exclude parties with significant support from the ballot", but the Court thought that one percent, or 22,000 signatures in 1972, "falls within the outer boundaries of support the State may require".[15.5] Similarly, independent candidates can be required to obtain a certain number of signatures as a condition to obtain ballot space.[16.5] A State may validly require that each voter participate only once in each year's nominating process and it may therefore disqualify any person who votes in a primary election from signing nominating or supporting petitions for independent parties or candidates.[17.5] Equally valid is a state requirement that a candidate for elective office, as an independent or in a regular party, must not have been affiliated with a political party, or with one other than the one of which he seeks its

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[13.5] *Storer* v. *Brown*, 415 U.S. 724, 746 (1974).

[14.5] Id., 730, quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968).

[15.5] *American Party of Texas* v. *White*, 415 U.S. 767, 783 (1974). In *Storer* v. *Brown*, 415 U.S. 724, 738–740 (1974), the Court remanded so that the district court could determine whether the burden imposed on an independent party was too severe, it being required in 24 days to gather, in 1972, 325,000 signatures from a pool of qualified voters who had not voted in that year's partisan primary elections. See also *Illinois State Bd. of Elec.* v. *Socialist Workers Party*, 440 U.S. 173 (1979) (voiding provision that required a larger number of signatures to get on ballot in subdivisions than statewide).

[16.5] *American Party of Texas* v. *White*, 415 U.S. 767, 788–791 (1974). The percentages varied with the office but no more than 500 signatures were needed in any event.

[17.5] Id., 785–787.

nomination within one year prior to the primary election at which nominations for the general election are made.[18.5] But it is impermissible to print the names of the candidates of the two major parties only on the absentee ballots, leaving off independents and other parties.[19.5]

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[18.5] *Storer* v. *Brown*, 414 U.S. 724, 728-737 (1974). Dissenting, Justices Brennan, Douglas and Marshall thought the state interest could be adequately served by a shorter time period than a year before the primary election, which meant in effect 17 months before the general election. Id., 755.

[19.5] *American Party of Texas* v. *White*, 415 U.S. 767, 794–796 (1974). Upheld, however, was state financing of the primary election expenses that excluded convention expenses of the small parties. Id., 791–794. But the major parties had to hold conventions simultaneously with the primary elections the cost of which they had to bear.

**[P. 1518, add to N. 5:]**

The district court decision holding the apportionment decisions inapplicable to election of judges was summarily affirmed. *Wells* v. *Edwards*, 409 U.S. 1095 (1973) (Justices White, Douglas, and Marshall dissenting). For another exception, see *Salyer Land Co.* v. *Tulare Water Storage District*, 410 U.S. 719 (1973), and *Associated Enterprices* v. *Toltec Watershed Imp. Dist.*, 410 U.S. 743 (1973).

**[P. 1519, in text following N. 11, add:]**

Significant changes of policy have occurred in the Court's treatment of the population equality requirement of the apportionment cases. Relying upon language in prior decisions that distinguished legislative apportionment from congressional districting as possibly justifying different standards of permissible deviations from equality, the Court has held that more flexibility is constitutionally permissible with respect to the former than to the latter.[20.5] But it was in determining how much greater flexibility was permissible that the Court moved in new directions. First, applying the traditional standard of rationality rather than the strict test of compelling necessity, the Court held that a maximum 16.4% deviation from equality of population was justified by the State's policy of maintaining the integrity of political subdivision lines, or according representation to subdivisions *qua* subdivisions, because the legislature was responsible for much local legislation.[21.5] Second, just as the first case "demonstrates, population deviations among districts may be sufficiently large to require justification but nonetheless be justified and legally sustainable. It is

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[20.5] *Mahan* v. *Howell*, 410 U.S. 315, 320–325 (1973).

[21.5] Id., 325–330. The Court indicated that a 16.4% deviation "may well approach tolerable limits." Id., 329. Dissenting, Justices Brennan, Douglas, and Marshall would have voided the plan; additionally, they thought the deviation was actually 23.6% and that the plan discriminated geographically against one section of the State, an issue not addressed by the Court. In *Chapman* v. *Meier*, 420 U.S. 1, 21–26 (1975), in considering a 20% variation in a court-developed plan, the Court indicated that such a deviation in a legislatively-produced plan would be quite difficult to justify. See also *Summers* v. *Cenarrusa*, 413 U.S. 906 (1973) (vacating and remanding for further consideration the approval of a 19.4% deviation).

now time to recognize . . . that minor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State."[22.5] This recognition of a *de minimis* deviation, below which no justification was necessary, was mandated, the Court felt, by the margin of error in census statistics, by the population change over the ten-year life of an apportionment, and by the relief it afforded federal courts able thus to avoid over-involvement in essentially a political process. The "goal of fair and effective representation" is furthered by eliminating gross population variations among districts, but it is not achieved by mathematical equality solely. Other relevant factors are to be taken into account.[23.5] But when a judiciary-imposed plan is to be formulated upon state default, it "must ordinarily achieve the goal of population equality with little more than *de minimis* variation" and deviations from approximate population equality must be supported by enunciation of historically significant state policy or unique features.[24.5]

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[22.5] *Gaffney* v. *Cummings*, 412 U.S. 735, 745 (1973). The maximum deviation was 7.83%. The Court did not precisely indicate at what point a deviation had to be justified, but it applied the *de minimis* standard in *White* v. *Regester*, 412 U.S. 755 (1973), in which the maximum deviation was 9.9%. "Very likely, larger differences between districts would not be tolerable without justifications." Id., 764. Justices Brennan, Douglas, and Marshall dissented.

[23.5] *Gaffney* v. *Cummings*, 412 U.S. 735, 748 (1973).

[24.5] *Chapman* v. *Meier*, 420 U.S. 1, 21–27 (1975). The Court did say that court-ordered reapportionment of a state legislature need not attain the mathematical preciseness required for congressional redistricting. Id., 27 n. 19. Apparently, therefore, the Court's reference to both "*de minimis*" variations and "approximate population equality" must be read as referring to some range approximating the *Gaffney* principle. See also *Connor* v. *Finch*, 431 U.S. 407 (1977).

**[P. 1519, add to N. 13:]**

Upholding an apportionment plan frankly admitted to have been drawn with the intent to achieve a rough approximation of the statewide political strengths of the two parties, the Court recognized the goal as legitimate and observed that, while the manipulation of apportionment and districting is not wholly immune to judicial scrutiny, "we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States." *Gaffney* v. *Cummings*, 412 U.S. 735, 751, 754 (1973).

**[P. 1520, at the end of the first paragraph on the page, add:]**

Perhaps surprisingly in the light of *Whitcomb* v. *Chavis*,[1.5] and its high standard of proof, the Court in *White* v. *Regester*[2.5] affirmed a

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[1.5] 403 U.S. 124 (1971).

[2.5] 412 U.S. 755, 765–770 (1973). "To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." Id., 765–766.

district court invalidation of the use of multimember districts in two Texas counties on the ground that, when considered in the totality of the circumstances of discrimination in registration and voting and in access to other political opportunities, such use denied Negroes and Mexican-Americans the opportunity to participate in the election process in a reliable and meaningful manner.

Doubt was cast on the continuing vitality of *White* v. *Regester*, however, by the badly split opinion of the Court in *City of Mobile* v. *Bolden*.[63] A plurality undermined the earlier case in two respects, although it is not at all clear that a majority of the Court has been or can be assembled on either point. First, the plurality argued that an intent to discriminate on the part of the redistricting body must be shown before multimember districting can be held to violate the equal protection clause.[64] Second, the plurality read *White* v. *Regester* as being consistent with this principle and the various factors developed in that case to demonstrate the existence of unconstitutional discrimination to be in fact indicia of intent; however, the plurality seemingly disregarded the totality of circumstances test utilized in *Regester* and evaluated instead whether each factor alone was sufficient proof of intent.[65] The status of multimember districting is thus in a highly unsettled state.

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[63] 446 U.S. 55 (1980). That Congress has the power, under its enforcement authority, to proscribe discriminatory effects as well as discriminatory intent in districting and other electoral schemes, whatever *Bolden* may ultimately be determined to mean, was made clear the same day in *City of Rome* v. *United States*, 446 U.S. 156 (1980).

[64] *City of Mobile* v. *Bolden*, 446 U.S. 55, 65–68 (1980) (Justice Stewart with Chief Justice Burger and Justices Powell and Rehnquist). Justices Blackmun and Stevens concurred on other grounds, id., 80, 83, and Justices White, Brennan, and Marshall dissented. Id., 94, 103. Justices Blackmun and White assume that intent is required, while Justices Stevens, Brennan, and Marshall would not so hold.

[65] Id., 68–74. Four Justices reject this view of the plurality, while a fifth, Justice Stevens, appears to do so but following a mode of analysis significantly different than that of any other Justice.

**[P. 1520, add to N. 16:]**

The Court has reiterated its *Connor* v. *Johnson* preference for single-member districts when the apportionment plan is judicially formulated. The preference is equally strong whether the remedy is being imposed for one-person, one-vote violations or for dilutions of the voting strength of racial minorities. If a district court uses multimember districts, it must articulate a significant state interest supporting its action. *Chapman* v. *Meier*, 420 U.S. 1, 14–21 (1975); *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976); cf. *Wise* v. *Lipscomb*, 437 U.S. 535 (1978). For statement of such an articulation, see *Mahan* v. *Howell*, 410 U.S. 315, 333 (1973).

**[P. 1521, add to N. 19:]**

See also *Salyer Land Co.* v. *Tulare Water Storage District*, 410 U.S. 719 (1973); *Associated Enterprises* v. *Toltec Watershed Imp. Dist.*, 410 U.S. 743 (1973).

### The Right to Travel

**[P. 1520, at end of first paragraph, add:]**

However, a state one-year durational residency requirement for the initiation of a divorce proceeding was sustained in *Sosna* v. *Iowa*.[1.5] While it is not clear what the precise basis of the ruling is, it appears that the Court found the State's interest in requiring that those who seek a divorce from its courts be genuinely attached to the State and its desire to insulate divorce decrees from the likelihood of collateral attack justified the requirement.[2.5]

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[1.5] 419 U.S. 393 (1975). Justices Marshall and Brennan dissented on the merits. Id., 418.

[2.5] Id., 409. But the Court also indicated that plaintiff was not absolutely barred from the state courts, merely required to wait for access, which was true in the prior cases as well and there held immaterial, and that possibly the state interests in marriage and divorce were more exclusive and thus more immune from federal constitutional attack than were the matters at issue in the previous cases. The Court also did not indicate whether it was using strict or traditional scrutiny.

**[P. 1521, add to N. 1:]**

But it is permissible for jurisdictions to make distinctions between residents and nonresidents of local neighborhoods in order to, e.g., reduce air pollution and other environmental effects of automobile commuting, by restricting on-street parking that is available to commuters. *Arlington County Bd.* v. *Richards*, 434 U.S. 5 (1977) (it appears that the commuters affected were both intra- and inter-state commuters).

**[P. 1521, add to N. 3:]**

The durational residency cases should be distinguished from situations in which residency is a prerequisite for qualification for an office or benefit. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 255 (1974). And continuing residency requirements do not raise a right to travel issue. *McCarthy* v. *Philadelphia Civil Service Comm.*, 424 U.S. 645 (1976) (ordinance requiring city employees to be and to remain city residents upheld).

**[P. 1522, add to N. 8:]**

*Shapiro* was reaffirmed and extended in *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974), voiding a requirement of one year's residency in a county as a condition to an indigent's receiving nonemergency hospitalization or medical care at the county's expense. The opinion is basically a restatement of the necessity for a compelling interest to support the condition and a rejection of the proffered set of interests, little different from that offered in *Shapiro*. Chief Justice Burger and Justice Blackmun concurred in the result only and Justice Rehnquist dissented. Id., 277.

**[P. 1522, add to N. 9:]**

The Court has found justified by proffered state interests the imposition of 50-day durational residency requirements (or closure of registration 50 days before the election) in *Marston* v. *Lewis*, 410 U.S. 679 (1973), and *Burns* v. *Fortson*, 410 U.S. 686 (1973). Durational residency requirements of five and seven years respectively for candidates for elective office were sustained in *Kanapaux* v. *Ellisor*, 419 U.S. 891 (1974), and *Sununu* v. *Stark*, 420 U.S. 958 (1975).

**[P. 1522, add to N. 10:]**

In *Vlandis* v. *Kline*, 412 U.S. 441, 452 and n. 9 (1973), and see id., 456, 464, 467 (concurring and dissenting opinions), the Court indicated in dicta that a one-year durational residency qualification for lower instate tuition at public colleges was constitutionally justifiable. Justices Marshall and Brennan indicated reservations about the point, id., 454, but Justice Marshall's opinion for the Court in *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 256 (1974), notes the result and repeats that "some waiting periods . . . may not be penalties' " and would thus be valid.

**[P. 1522, at bottom of page, add:]**

## Marriage and Familial Relations

In *Zablocki* v. *Redhail*,[19] importing into equal protection analysis the doctrines developed in substantive due process, the Court identified the right to marry as a "fundamental interest", that necessitates "critical examination" of governmental restrictions which "interfere directly and substantially" with the right.[20] Struck down was a statute that prohibited any resident under an obligation to support minor children from marrying without a court order; such order could only be obtained upon a showing that the support obligation had been and was being complied with and that the children were not and were not likely to become public charges. Plaintiff was an indigent wishing to marry but prevented from doing so because he was not paying support under a court order to an illegitimate child he had fathered and because the child was receiving public assistance. Applying "critical examination", the Court observed that the statutory prohibition could not be sustained unless it was justified by sufficiently important state interests and was closely tailored to effectuate only those interests.[21] Two interests were offered that the Court was willing to accept as legitimate and substantial: requiring permission under the circumstances furnished an opportunity to counsel applicants on the necessity of fulfilling support obligations and the process protected the welfare of children who needed support, either by providing an incentive to make support payments or by preventing applicants from incurring new obligations through marriage. The first interest was found not served, there being no provision for counseling and no authorization of permission to marry once counseling had taken place. The second interest was found not to be effectuated by the means. Alternative devices to collect support existed, the process simply prevented marriage without delivering any money to the children, and it singled out obligations incurred through marriage without reaching any other obligations.

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[19] 434 U.S. 374 (1978).

[20] Although the Court's due process decisions have broadly defined a protected liberty interest in marriage and family, no previous case had held marriage to be a fundamental right occasioning strict scrutiny. Id., 391, 397 (Justice Powell concurring).

[21] Id., 388. Although the passage is not phrased in the usual compelling interest terms, the concurrence and the dissent so viewed it without evoking disagreement from the Court. Id., 396 (Justice Powell), 403 (Justice Stevens), 407 (Justice Rehnquist). Justices Powell and Stevens would have applied intermediate scrutiny to void the statute, both for its effect on the ability to marry and for its impact upon indigents. Id., 400, 406 n. 10.

Other restrictions that relate to the incidents of or prerequisites for marriage were carefully preserved by the Court as neither entitled to rigorous scrutiny nor put in jeopardy by the decision.[illegible] For example, in *Califano* v. *Jobst*,[illegible] a unanimous Court sustained a Social Security provision that revoked disabled dependents' benefits of any person who married, except when the person married someone who was also entitled to receive disabled dependents' benefits. Plaintiff, a recipient of such benefits, married someone who was also disabled but not qualified for the benefits, and his benefits were terminated. He sued alleging that distinguishing between classes of persons who married eligible persons and who married ineligible persons infringed upon his right to marry. The Court rejected the argument, finding that benefit entitlement was not based upon need but rather upon the dependency of one upon the wage earner insured; marriage, Congress could have assumed, generally terminates the dependency of one upon his parent-wage earner. Therefore, it was permissible as an administrative convenience to make marriage the terminating point but to make an exception when both marriage partners were receiving benefits as a means of lessening hardship and recognizing that dependency was likely to continue. The marriage rule was therefore not to be strictly scrutinized or invalidated "simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby."[illegible]

It seems obvious, therefore, that the determination of marriage and familial relationships as fundamental will be a fruitful beginning of litigation in the equal protection area.[illegible]

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[illegible] Id., 386-387. Chief Justice Burger thought the interference here was "intentional and substantial", whereas the provision in *Jobst* was neither. Id., 391 (concurring).

[illegible] 434 U.S. 47 (1977) (Fifth Amendment).

[illegible] Id., 54. See also *Mathews* v. *De Castro*, 429 U.S. 181 (1976) (Fifth Amendment) (provision giving benefits to a married woman under 62 with dependent children in her care whose husband retires or becomes disabled, but denying them to a divorced woman under 62 with dependents represents a rational judgment by Congress with respect to likely dependency of married but not divorced women and does not deny equal protection); *Califano* v. *Boles*, 443 U.S. 282 (1979) (Fifth Amendment) (limitation of certain Social Security benefits to widows and divorced wives of wage earners does not deprive mother of illegitimate child who was never married to wage earner of equal protection).

[illegible] See, e.g., *Quilloin* v. *Walcott*, 434 U.S. 246 (1978) (State's giving to father of legitimate child who is divorced or separated from mother while denying to father of illegitimate child a veto over the adoption of the child by another does not under the circumstances deny equal protection. The circumstances were that the father never exercised custody over the child or shouldered responsibility for his supervision, education, protection, or care, although he had made some support payments and given him presents).

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### Poverty and Fundamental Interests

**[P. 1525, in text following N. 15, add:]**

But, deciding a point left unresolved in *Douglas*, the Court held that neither the due process nor the equal protection clause required a State to furnish counsel to a convicted defendant seeking, after he has exhausted his appeals of right, to obtain discretionary review of his case in the State's higher courts or in the United States Supreme Court. Due process fairness does not require that after an appeal has been provided the State must always provide counsel to indigents at every stage. "Unfairness results only if indigents are singled out by the State and denied meaningful access to that system because of their poverty." That essentially equal protection issue was decided against the defendant in the context of an appellate system in which one appeal could be taken as of right to an intermediate court, with counsel provided if necessary, and in which further appeals might be granted not primarily upon any conclusion about the result below but upon considerations of significant importance.[1.5]

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[1.5] *Ross* v. *Moffitt*, 417 U.S. 600 (1974). See also *Fuller* v. *Oregon*, 417 U.S. 40 (1974) (statute providing, under circumscribed conditions, that indigent defendant, who receives state-compensated counsel and other assistance for his defense, who is convicted, and who subsequently becomes able to repay costs, must reimburse State for costs of his defense in no way operates to deny him assistance of counsel or the equal protection of the laws).

**[P. 1526, add to N. 17:]**

See *Bounds* v. *Smith*, 430 U.S. 817 (1977).

**[P. 1527, add to end of second paragraph under this section:]**

Extending *Bullock*, the Court has held it impermissible for a State to deny indigents, and presumably other persons unable to pay filing fees, a place on the ballot for failure to pay filing fees, however reasonable in the abstract the fees may be. A State must provide such persons a reasonable alternative for getting on the ballot.[2.5]

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[2.5] *Lubin* v. *Panish*, 415 U.S. 709 (1974). Note that the Court indicates that *Bullock* was decided on the basis of restrained review. Id., 715.

**[P. 1527, add to text following N. 25:]**

The *Boddie* opinion left unsettled whether a litigant's interest in judicial access to effect a pacific settlement of some dispute was an interest entitled to some measure of constitutional protection as a value of independent worth or whether a litigant must be seeking to resolve a matter involving a fundamental interest in the only forum in which any resolution was possible. Subsequent decisions established that the latter answer was the choice of the Court. In *United States* v. *Kras*,[3.5] the Court held that the imposition of filing fees which blocked the access of an indigent to a discharge of his debts in bankruptcy denied

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[3.5] 409 U.S. 434 (1973). (Fifth Amendment).

the indigent neither due process nor equal protection. The marital relationship in *Boddie* was a fundamental interest, the Court said, and upon its dissolution depended associational interests of great importance; however, an interest in the elimination of the burden of debt and in obtaining a new start in life, while important, does not rise to the same constitutional level as marriage. Moreover, a debtor's access to relief in bankruptcy has not been monopolized by the government to the same degree as dissolution of a marriage; one may, "in theory, and often in actuality," manage to resolve the issue of his debts by some other means, such as negotiation. While the alternatives in many cases, such as Kras, seem barely likely of successful pursuit, the Court seemed to be suggesting that absolute preclusion was a necessary element before a right of access could be considered.[4.5]

Subsequently, on the initial appeal papers and without hearing oral argument, the Court summarily upheld the application to indigents of a filing fees that in effect precluded them from appealing decisions of a state administrative agency reducing or terminating public assistance [5.5]

***Educational Opportunity.***—Making even clearer its approach in *de facto* wealth classification cases, the Court in *San Antonio School Dist.* v. *Rodriguez* [6.5] rebuffed an intensive effort with widespread support in lower court decisions to invalidate the system prevalent in 49 of the 50 States of financing schools primarily out of property taxes with the consequent effect that the funds available to local school boards in each state were widely divergent. Plaintiffs had sought to bring their case within the strict scrutiny—compelling state interest doctrine of equal protection review by claiming that under the tax system there resulted a *de facto* wealth classification that was "suspect" or that education was a "fundamental" right and the disparity

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[4.5] Id., 443–446. The equal protection argument was rejected by utilizing the traditional standard of review, bankruptcy legislation being placed in the area of economics and social welfare, and the use of fees to create a self-sustaining bankruptcy system being considered to be a rational basis. Dissenting, Justice Stewart argued that *Boddie* required a different result, denied that absolute preclusion of alternatives was necessary, and would have evaluated the importance of an interest asserted rather than providing that it need be fundamental. Id., 451. Justice Marshall's dissent was premised on an asserted constitutional right to be heard in court, a constitutional right of access regardless of the interest involved. Id., 458. Justices Douglas and Brennan concurred in Justice Stewart's dissent, as indeed did Justice Marshall.

[5.5] *Ortwein* v. *Schwab*, 410 U.S. 656 (1973). The division was the same 5-to-4 that prevailed in *Kras*. That there are still unsettled areas here is revealed by the decision of the Court to review a case in which the right to appeal an adverse trial court decision was conditioned on the posting of a bond in twice the amount of the judgment rendered in the trial court. The case was remanded for consideration of intervening state court decisions following oral argument. *Patterson* v. *Warner*, 415 U.S. 303 (1974).

[6.5] 411 U.S. 1 (1973). The opinion by Justice Powell was concurred in by the Chief Justice and Justices Stewart, Blackmun, and Rehnquist. Justices Douglas, Brennan, White, and Marshall dissented. Id., 62, 63, 70.

in educational financing could not therefore be justified. The Court held, however, that there was neither a suspect classification nor a fundamental interest involved, that the system must be judged by the traditional restrained standard, and that the system was rationally related to the State's interest in protecting and promoting local control of education.[7.5]

Important as the result of the case is, the doctrinal implications are far more important. The attempted denomination of wealth as a suspect classification failed on two levels. First, the Court noted that plaintiffs had not identified the "class of disadvantaged 'poor'" in such a manner as to further their argument. That is, the Court found that the existence of a class of poor persons, however, defined, did not correlate with property-tax poor districts; neither as an absolute nor as a relative consideration did it appear that tax-poor districts contained greater numbers of poor persons than did property-rich districts, except in random instances. Second, the Court held, there must be an absolute deprivation of some right or interest rather than merely a relative one before the deprivation because of inability to pay will bring into play strict scrutiny. "The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[8.5] No such class had been identified here and more importantly no one was being absolutely denied an education; the argument was that it was a lower quality education than that available in other districts. Even assuming that to be the case, however, it did not create a suspect classification.

Education is an important value in our society, the Court agreed, being essential to the effective exercise of freedom of expression and intelligent utilization of the right to vote. "But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. . . . [T]he answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[9.5] A right to education is not expressly protected by the Constitution, continued the Court, and it was unwilling to find an implied right because of its undoubted importance. The quality of education increases the effectiveness of speech or the ability to make informed electoral choice but the judiciary is unable to determine what level of quality would be sufficient. Moreover, the system under attack

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[7.5] Id., 44–55. Applying the rational justification test, Justice White would have found that the system did not use means rationally related to the end sought to be achieved. Id., 63.

[8.5] Id., 20. But see id., 70, 117–124 (Justices Marshall and Douglas dissenting).

[9.5] Id., 30, 33–34. But see id., 62 (Justice Brennan dissenting), 70, 110–117 (Justices Marshall and Douglas dissenting).

did not deny educational opportunity to any child, whatever the result in that case might be; it was attacked for providing relative differences in spending and those differences could not be correlated with differences in educational quality.[10.5]

*Rodriguez* clearly promises judicial restraint in evaluating challenges to the affording of governmental benefits when the effect is relatively different because of the wealth of some of the recipients and when the results, what is obtained, vary in relative degrees. But even within the context of this restraint it seems evident that not all such challenges must fail.[11.5]

**Abortion.**—*Rodriguez* furnished the principal analytical basis for the Court's subsequent decision in *Maher* v. *Roe*,[12.5] holding that a State's refusal to provide public assistance for abortions that were not medically necessary under a program that subsidized all medical expenses otherwise associated with pregnancy and childbirth did not deny to indigent pregnant women equal protection of the laws. As in *Rodriguez*, it was held that the indigent are not a suspect class.[13.5] Again, as in *Rodriguez* and in *Kras*, it was held that when the State has not monopolized the avenues for relief and the burden is only relative rather than absolute, a governmental failure to offer assistance, while funding alternative actions, is not undue governmental interference with a fundamental right.[14.5] Expansion of this area of the law of equal protection seems especially limited.

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[10.5] Id., 29–39.

[11.5] Thus, the Court reviewed a New York system under which indigent elementary public school children did not receive a loan of textbooks unless the voters of each district voted to levy a tax for that purpose, but after argument the case was remanded to determine the question of mootness. *Johnson* v. *State Educ. Dept.*, 409 U.S. 75 (1972). Similarly, the Court accepted for review a case in which it was contended that the failure of a school system to provide English language instruction to a large number of students of Chinese ancestry who spoke little or no English denied the students equal protection, but it held for the students on statutory grounds. *Lau* v. *Nichols*, 414 U.S. 563 (1974).

[12.5] 432 U.S. 464 (1977). See *supra, p. S210.*

[13.5] Id, 470–471.

[14.5] Id., 471–474. See also *Harris* v. *McRae*, 448 U.S. 297, 322–323 (1980). Total deprivation was the theme of *Boddie* and was the basis of concurrences by Justices Stewart and Powell in *Zablocki* v. *Redhail*, 434 U.S. 374, 391, 396 (1978), in that the State imposed a condition indigents could not meet and made no exception for them. The case also emphasizes that *Dandridge* v. *Williams*, 397 U.S. 471 (1970), imposes a rational basis standard in equal protection challenges to social welfare cases. But see *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), where the majority rejected the dissent's argument that this should always be the same.

## Sec. 2. Apportionment of Representation

**[P. 1529, in text following N. 3, add:]**

However, in *Richardson* v. *Ramirez*,[1.5] the Court relied upon the implied approval of disqualification upon conviction of crime to

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[1.5] 418 U.S. 24 (1974). Justices Marshall, Douglas, and Brennan dissented. Id., 56, 86.

uphold a state law disqualifying convicted felons for the franchise even after the service of their terms. It declined to assess the state interests involved and to evaluate the necessity of the rule, holding rather that because of § 2 the equal protection clause was simply inapplicable.

### Sec. 5. Enforcement

**[P. 1538, add to N. 25:]**

Congress' power received, in the light of *Oregon* v. *Mitchell*, a surprisingly broad reading in *City of Rome* v. *United States*, 446 U.S. 156, 173–183 (1980) (Fifteenth Amendment). See also *Fullilove* v. *Klutznick*, 448 U.S. 448, 476–478 (1980) (plurality opinion by Chief Justice Burger), and id., 500–502 (Justice Powell concurring).

**[P. 1538, add N. 26 to the end of the paragraph and insert as text of N. 26:]**

[26] In *Anderson* v. *United States*, 417 U.S. 211 (1974), the Court avoided decision whether a conspiracy under color of law to cast false ballots in elections for local offices in the absence of racial motivations could be prosecuted under 18 U.S.C. § 241, punishing conspiracies to deny to any citizen the enjoyment "of any right or privilege, secured to him by the Constitution." Justices Douglas and Brennan argued that § 241 could be applied to prosecute election offenses when state or local elections were involved only when racial bias was the motivation. Id., 228.

## AMENDMENT 15—RIGHT OF CITIZENS TO VOTE

**[P. 1545, add to N. 21:]**

For a dispute, in which neither view yet appears victorious, with respect to whether the Amendment reaches only vote denials or applies as well to vote dilutions and whether discriminatory intent is the gravamen of a 15th Amendment complaint, in the context of multimember districting as alleged racial gerrymandering, see *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980).

**[P. 1550, in text folowing N. 6, add:]**

Expansively reading the scope of congressional power under § 2, the Court in *City of Rome* v. *United States*[1.5] held that, even if discriminatory intent was a prerequisite to finding a violation of § 1 by the courts,[2.5] Congress had the authority to go beyond that and proscribe electoral devices that had the effect of discriminating. The section, like § 5 of the Fourteenth Amendment, was in effect a "necessary and proper clause" enabling Congress to enact enforcement legislation which was rationally related to the end sought and which was not prohibited by but was consistent with the letter and spirit of the Constitution, even though the practice outlawed or restricted did not in itself violate the Fifteenth Amendment. In so acting, Congress could prohibit state action that perpetuated the effect of past discrimination or that, because of the existence of past purposeful discrimination, raised a risk of purposeful discrimination that might not lend itself to judicial invalidation. "It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are 'appropriate,' as that term is defined in *McCulloch* v. *Maryland* and *Ex parte Virginia*, 100 U.S. 339 (1880)."[3.5]

While the Court's early opinions mandated a broad interpretation of the Voting Rights Act to effect its remedial purposes,[4.5] subsequent decisions have been mixed and some narrowing of application has occurred,[5.5] perhaps in line with the increased federalism concerns of sev-

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[1.5] 446 U.S. 156 (1980). Justices Powell and Rehnquist dissented. Id., 193, 206.

[2.5] Cf. *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980).

[3.5] *City of Rome* v. *United States*, 446 U.S. 156, 177 (1980).

[4.5] *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969); *Perkins* v. *Matthews*, 400 U.S. 379 (1971); *Georgia* v. *United States*, 411 U.S. 526 (1973).

[5.5] Compare *City of Richmond* v. *United States*, 422 U.S. 358 (1975), and *Beer* v. *United States*, 425 U.S. 130 (1976), with *United States* v. *Bd. of Comrs. of Sheffield*, 435 U.S. 110 (1978), *Doughtery County Bd. of Educ.* v. *White*, 439 U.S. 32 (1978), and *City of Rome* v. *United States*, 446 U.S. 156 (1980). And see *City of* eral Justices.[6.5] Legislatively, the 1975 amendments to the Act considerably expanded both its geographic and its substantive coverage, thus ensuring judicial elaboration of its meanings and limits.[7.5]

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*Mobile* v. *Bolden*, 446 U.S. 55 (1980) (majority of Court concurs that § 2 of the Act reaches no further than does the Fifteenth Amendment but no agreement on what the limits are).

[6.5] E.g., *Georgia* v. *United States*, 411 U.S. 526, 545 (1975); *City of Rome* v. *United States*, 446 U.S. 156, 193, 200–205 (1980) (Justice Powell dissenting). Cf. *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (federalism limits on Congress' commerce powers). It is clear that federalism is less of a limitation on Congress' power to enforce the 14th and 15th Amendments than it is on the powers granted in the body of the Constitution. *City of Rome* v. *United States*, *supra*, 178–180.

[7.5] P.L. 94–73, 89 Stat. 400. The Act was extended for seven years, it was expanded to include those areas having minorities distinguished by their language, i.e., "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage," § 207, 42 U.S.C. § 1973 1(c) (3), in which certain statistical tests are met and requiring election materials be provided in the language(s) of the group(s), and it was further enlarged to require bilingual elections if more than five percent of the voting age citizens of a political subdivision are members of a single language minority group whose illiteracy rate is higher than the national rate.

## AMENDMENT 21—REPEAL OF EIGHTEENTH AMENDMENT

**[P. 1580, add to N. 17:]**

The principle was reaffirmed in *United States* v. *Mississippi Tax Comm.*, 412
U.S. 363 (1973), holding that Mississippi could not apply its tax regulations to
liquor sold to military officers' clubs and other nonappropriated fund activities
located on bases within the State and over which the United States had obtained
exclusive jurisdiction. "Absent an appropriate express reservation . . . the
Twenty-first Amendment confers no power on a State to regulate—whether by
the importation of distilled spirits into ter-
licensing, taxation, or otherwise—the importation of distilled spirits into ter-
ritory over which the United States exercises exclusive jurisdiction." Id., 375.
As to bases over which the United States exercises concurrent jurisdiction only,
see *United States* v. *Mississippi Tax Comm.*, 421 U.S. 599 (1975).

**[P. 1580, add new section following N. 19 in text:]**

***State Power versus First Amendment Restraint.***—In *Cali-*
*fornia* v. *LaRue*,[1.5] the Court sustained the facial constitutionality of
regulations barring a lengthy list of actual or simulated sexual activi-
ties, and motion picture portrayals of these activities, in establish-
ments licensed to sell liquor by the drink. It was conceded that the
regulations reached expression that would not be deemed legally
obscene under prevailing standards and reached expressive conduct
that would not be prohibitable under prevailing standards, but the
Court thought that the second section of the Twenty-first Amendment
established a presumption of validity attaching to state regulation
of liquor which, when applied to bar the questioned activities in places
selling liquor by the drink, permitted such regulations to have a
broader reach than they could otherwise constitutionally have.[2.5] In
addition to the First Amendment implications of the decision, the
Court's recurrence to the Twenty-first Amendment as the source of
state power indicates a continuation of judicial refusal to restrain
state regulation of alcoholic beverages that would otherwise raise
commerce clause questions.

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[1.5] 409 U.S. 109 (1972).

[2.5] Id., 114–119. Justices Brennan and Marshall dissented, arguing that the
regulations were overbroad and therefore unconstitutional and, additionally, that
they constituted an unconstitutional condition upon possession of a liquor
license, requiring the licensee to give up his First Amendment rights in return
for a license. Id., 123. Justice Douglas dissented on other grounds. Id., 120. For
the possible limits of this decision, see *Peto* v. *Cook*, 364 F. Supp. 1 (D.C.S.D.
Ohio, 1973), *aff'd per curiam*, 415 U.S. 943 (1974) (regulations proscribing and
permitting seizure of magazines not determined in an adversary hearing to be
obscene when sold on premises where liquor is sold for off-premises consumption
invalid under First and Fourth Amendments).

**Equal Protection and Alcohol Regulation.**—In a 1936 opinion, the Court had said that "[a] classification recognized by the Twenty-first Amendment cannot be deemed forbidden for the Fourteenth."[3.5] While the language was uttered in the context of economic regulation and was thus distinguishable from personal liberties situations, it and the decision, as well as language, of *LaRue*, raised the possibility that when dealing in alcohol regulation the States were much freer to trench upon individual rights than they would otherwise be. In *Craig* v. *Boren*,[4.5] the Court held otherwise, without however dealing more than obliquely with the precedent of *LaRue*. *Craig* involved a state law that prescribed different minimum drinking ages for men and women and it was invalidated as an impermissible gender discrimination. To the Twenty-first Amendment argument, the Court replied that the Amendment "primarily created an exception to the normal operation of the Commerce Clause" and that its "relevance . . . to other constitutional provisions" is doubtful. "'Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.'"[5.5] The square holding on this point is "that the operation of the Twenty-first Amendment does not alter the application of the equal protection standards that would otherwise govern this case."[6.5]

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[3.5] *State Bd.* v. *Young's Market Co.*, 299 U.S. 59, 64 (1936). In *Craig* v. *Boren*, 429 U.S. 190, 206–207 (1976), this case and others like it are distinguished as involving the importation of intoxicants into a State, an area of increased state regulatory power, and as involving purely economic regulation traditionally meriting only restrained review. Neither distinguishing element, of course, addresses the precise language quoted.

[4.5] 429 U.S. 190, 204–210 (1976). Justice Blackmun did not join the opinion on this point but agreed that the Amendment did not save the statute, id., 214, while Justice Stewart's concurrence was more limited than the Court's view of the guiding principles. Ibid. The dissents of Chief Justice Burger and Justice Rehnquist did not discuss the effect of the Amendment.

[5.5] Id., 206 (quoting P. Brest, *Processes of Constitutional Decisionmaking, Cases and Material* (1975), 258).

[6.5] *Supra*, 429 U.S., 209–210. The holding without discussion of the effect of the Amendment had been achieved, in a racial classification context, in *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 178–179 (1972).

**[P. 1581, in text following N. 22, add:]**

Following a review of the cases in this area, the Court has observed "that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a 'concrete case.' "[1.5] Invalidating under the Sherman Act a state fair trade scheme imposing a resale price maintenance policy for wine, the Court balanced the federal interest in free enterprise expressed through the antitrust laws against the asserted state interests in promoting temperance and orderly marketing conditions. Since the state courts had found the policy under attack promoted neither interest significantly, the Supreme Court experienced no difficulty in concluding the federal interest prevailed. Whether more substantial state interests or means more suited to promoting the state interests would survive attack under federal legislation must await further litigation.

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[1.5] *California Retail Liquor Dealers Assn. v. Midcal Aluminum*, 445 U.S. 97, 110 (1980).

# TWENTY-FIFTH AMENDMENT

## Presidential and Vice Presidential Vacancy

**[P. 1591, add at end of text]**

This Amendment saw multiple use in this period, that resulted at the end in the accession to the Presidency and Vice-Presidency for the first time in our history of two men who had not faced the voters in a national election. First, Vice President Spiro Agnew resigned on October 10, 1973, and President Nixon nominated Gerald R. Ford of Michigan to succeed him, following the procedures of § 2 of the Amendment for the first time. Hearings were held upon the nomination by the Senate Rules Committee and the House Judiciary Committee, both Houses thereafter confirmed the nomination, and the new Vice President took the oath of office December 6, 1973. Second, President Richard M. Nixon resigned his office August 9, 1974, and Vice President Ford immediately succeeded to the office and took the presidential oath of office at noon of the same day. Third, again following § 2 of the Amendment, President Ford nominated Nelson A. Rockefeller of New York to be Vice President on August 20, 1974, hearings were held in both Houses, confirmation voted and Mr. Rockefeller took the oath of office December 19, 1974.

# ACTS OF CONGRESS HELD UNCONSTITUTIONAL IN WHOLE OR IN PART BY THE SUPREME COURT OF THE UNITED STATES

**[P. 1618, add No. 87a in list:]**

87a. Act of September 2, 1958 (§ 5601(b) (1), 72 Stat. 1399).

Provision of Internal Revenue Code creating a presumption that one's presence at the site of an unregistered still shall be sufficient for conviction under a statute punishing possession, custody, or control of an unregistered still unless defendant otherwise explained his presence at the site to the jury is unconstitutional because the presumption is not a legitimate, rational, or reasonable inference that defendant was engaged in one of the specialized functions proscribed by the statute.

*United States* v. *Romano*, 382 U.S. 136 (1965).

**[P. 1619, at end of list, add:]**

93. Act of August 10, 1939 (§ 201(d), 53 Stat. 1362, as amended, 42 U.S.C. § 402(g)).

Provision of Social Security Act that grants survivors' benefits based on the earnings of a deceased husband and father covered by the Act to his widow and to the couple's children in her care but that grants benefits based on the earnings of a covered deceased wife and mother only to the minor children and not to the widower violates the right to equal protection secured by the Fifth Amendment's due process clause, since it unjustifiably discriminates against female wage earners required to pay social security taxes by affording them less protection for their survivors than is provided for male wage earners.

*Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975).

94. Act of July 31, 1946 (ch. 707, § 7, 60 Stat. 719).

District court decision holding invalid under First and Fifth Amendments statute prohibiting parades or assemblages on United States Capitol grounds is summarily affirmed.

*Chief of Capitol Police* v. *Jeannette Rankin Brigade*, 409 U.S. 972 (1972).

95. Act of August 28, 1950 (§ 202(f) (1) (E), 64 Stat. 485, 42 U.S.C. § 402(f) (1) (D)).

Social Security Act provision awarding survivors' benefits based on earnings of a deceased wife to widower only if he was receiving at least half of his support from her at the time of her death, whereas widow receives benefits regardless of dependency, violates equal protection element on Fifth Amendment's due process clause because of its impermissible gender classification.

*Califano* v. *Goldfarb*, 430 U.S. 199 (1977).
**Concurring**: Justices Brennan, White, Marshall, and Powell.
**Concurring specially**: Justice Stevens.
**Dissenting**: Justices Rehnquist, Stewart, Blackmun, and Chief Justice Burger.

96. Accord: Act of October 30, 1951 (§ 5(*f*) (ii), 65 Stat. 683, 45 U.S.C. § 231a (c) (3) (ii).

Provision of Railroad Retirement Act similar to section voided in *Goldfarb*.

*Railroad Retirement Bd.* v. *Kalina*, 431 U.S. 909 (1977).

97. Act of September 2, 1958 (§ 1(25) (B), 72 Stat. 1446), and Act of September 7, 1962 (§ 401, 76 Stat. 469).

Federal statutes providing that spouses of female members of the Armed Forces must be dependent in fact in order to qualify for certain dependent's benefits, whereas spouses of male members are statutorily deemed dependent and automatically qualified for allowances, whatever their actual status, is an invalid gender classification under the equal protection principles of the Fifth Amendment's due process Clause.

*Frontiero* v. *Richardson*, 4111 U.S. 677 (1973).
**Concurring**: Justices Brennan, Douglas, White, and Marshall.
**Concurring specially**: Justices Powell and Blackmun and Chief Justice Burger; Justice Stewart.
**Dissenting**: Justice Rehnquist.

98. Act of July 30, 1965 (§ 339, 79 Stat. 409).

Section of Social Security Act qualifying certain illegitimate children for disability insurance benefits by presuming dependence but disqualifying other illegitimate children, regardless of dependency, if the disabled wage earner parent did not contribute to the child's support before the onset of the disability or if the child did not live with the parent before the onset of disability denies latter class of children equal protection as guaranteed by the due process clause of the Fifth Amendment.

*Jiminez* v. *Weinberger*, 417 U.S. 628 (1974).
**Concurring**: Chief Justice Burger and Justices Douglas, Brennan, Stewart, White, Marshall, Blackmum, and Powell.
**Dissenting**: Justice Rehnquist.

99. Act of September 3, 1966 (§ 102(b), 80 Stat. 831), and Act of April 8, 1974 (§§ 6(a) (1) (amending § 3(d) of Act), 6(a) (2) amending 3(e) (2) (C), 6(a) (5) (amending § 3(s) (5), and 6(a) (6) (amending § 3(x)).

Those sections of the Fair Labor Standards Act extending wage and hour coverage to the employees of state and local governments are invalid because Congress lacks the authority under the commerce

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clause to regulate employee activities in areas of traditional governmental functions of the States.

*National League of Cities v. Usery*, 426 U.S. 833 (1976).
Concurring: Justices Rehnquist, Stewart, Blackmun, Powell and Chief Justice Burger.
Dissenting: Justices Brennan, White and Marshall; Justice Stevens.

100. Act of January 2, 1968 (§ 163(a)(2), 81 Stat. 872).

District court decisions holding unconstitutional under Fifth Amendment's due process clause section of Social Security Act that reduced, perhaps to zero, benefits coming to illegitimate children upon death of parent in order to satisfy the maximum payment due the wife and legitimate children are summarily affirmed.

*Richardson v. Davis*, 409 U.S. 1069 (1972).
*Richardson v. Griffin*, 409 U.S. 1069 (1972).

101. Act of January 2, 1968 (§ 203, 81 Stat. 882).

Provision of Social Security Act extending benefits to families whose dependent children have been deprived of parental support because of the unemployment of the father but not giving benefits when the mother becomes unemployed impermissibly classifies on the basis of gender and violates the Fifth Amendment's due process clause.

*Califano v. Westcott*, 443 U.S. 76 (1979).

102. Act of December 29, 1970 (§ 8(a), 84 Stat. 1598, 29 U.S.C. § 657(a)).

Provision of Occupational Safety and Health Act authorizing inspections of covered work places in industry without warrants violates Fourth Amendment.

*Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978).
Concurring: Justices White, Stewart, Marshall, Powell, and Chief Justice Burger.
Dissenting: Justices Stevens, Blackmun, and Rehnquist.

103. Act of January 11, 1971 (§ 2, 84 Stat. 2048).

Provision of Food Stamp Act disqualifying from participation in program any household containing an individual unrelated by birth, marriage, or adoption to any other member of the household violates the due process clause of the Fifth Amendment.

*Department of Agriculture v. Moreno*, 413 U.S. 528 (1973).
Concurring: Justices Brennan, Douglas, Stewart, White, Marshall, Blackmun, and Powell.
Dissenting: Justice Rehnquist and Chief Justice Burger.

104. Act of January 11, 1971 (§ 4, 84 Stat. 2049).

Provision of Food Stamp Act disqualifying from participation in program any household containing a person 18 years or older who had been claimed as a dependent child for income tax purposes in the present or preceding tax year by a taxpayer not a member of the household violates the due process clause of the Fifth Amendment.

*Dept. of Agriculture* v. *Murray*, 413 U.S. 508 (1973).
Concurring: Justices Douglas, Brennan, Stewart, White, and Marshall.
Dissenting: Justices Blackmun, Rehnquist, Powell, and Chief Justice Burger.

105. Federal Election Campaign Act of February 7, 1972 (86 Stat. 3), as amended by the Federal Campaign Act Amendments of 1974 (88 Stat. 1263), adding or amending 18 U.S.C. §§ 608(a), 608(e), and 2 U.S.C. § 437c.

Provisions of election law that forbid a candidate or the members of his immediate family from expending personal funds in excess of specified amounts, that limit to $1,000 the independent expenditures of any person relative to an identified candidate, and that forbid expenditures by candidates for federal office in excess of specified amounts violate the First Amendment speech guarantees; provisions of the law creating a commission to oversee enforcement of the Act are an invalid infringement of constitutional separation of powers in that they devolve responsibilities upon a commission four of whose six members are appointed by Congress and all six of whom are confirmed by the House of Representatives as well as by the Senate, not in compliance with the appointments clause.

*Buckley* v. *Valeo*, 424 U.S. 1 (1976).
Concurring: Justices Brennan, Stewart, Blackmun, Powell, and Rehnquist, and Chief Justice Burger.
Dissenting (expenditure provisions only): Justice White.
Dissenting (candidate's personal funds only): Justice Marshall.

# STATE ACTS HELD UNCONSTITUTIONAL

**[P. 1768, at end of list, add:]**

797. *Texas Board of Barber Examiners* v. *Bolton*, 409 U.S. 807 (1972).

District court decision holding invalid under equal protection clause Texas statutes prohibiting licensed cosmetologists from working with male customers and prohibiting licensed barbers from working with female customers is summarily affirmed.

798. *Essex* v. *Wolman*, 409 U.S. 808 (1972).

District court decision holding void under the establishment clause of the First Amendment an Ohio statute providing a reimbursement grant to parents of children attending nonpublic schools is summarily affirmed.

799. *Sterrett* v. *Mothers' and Children's Rights Organization*, 409 U.S. 809 (1972).

District court decision holding invalid as in conflict with federal Social Security Act an Indiana statute denying benefits to persons aged 16 to 18 who are eligible but for the fact that they are not regularly attending school is summarily affirmed.

800. *Robinson* v. *Hanrahan*, 409 U.S. 38 (1972).

Illinois statute providing for mailing of vehicle forfeiture proceeding notification to home address of vehicle owner is unconstitutional as applied to person known to the State to be incarcerated and not at home.

801. *Amos* v. *Sims*, 409 U.S. 942 (1972).

District court decision holding unconstitutional Alabama legislative apportionment law is summarily affirmed.

802. *Fugate* v. *Potomac Electric Power Co.*, 409 U.S. 942 (1972).

District court decision holding invalid under equal protection clause Virginia statute allowing reimbursement to utilities required by interstate highway construction to relocate their lines in cities and towns but denying reimbursement to utilities required by interstate highway construction to relocate lines in counties is summarily affirmed.

803. *Ward* v. *Village of Monroeville*, 409 U.S. 57 (1972).

Ohio statute authorizing trial for certain ordinance violations and traffic offenses before mayor responsible for village finances when the fines, forfeitures, costs, and fees imposed in the mayor's courts provided a substantial portion of village funds denied defendants opportunity for trial before an impartial and disinterested tribunal.

Justices Concurring: Brennan, Douglas, Stewart, Marshall, Blackmun and Powell, and Chief Justice Burger.
Justices Dissenting: White and Rehnquist.

804. *Evco* v. *Jones*, 409 U.S. 91 (1972).

New Mexico's gross receipts tax is unconstitutionally applied to proceeds from transactions whereby material is produced in State under contract for delivery to out-of-state clients because it impermissibly burdens interstate commerce.

805. *Philpott* v. *Welfare Board*, 409 U.S. 413 (1973).

New Jersey statute providing for recovery by State of reimbursement for financial assistance when recipient subsequently obtains funds cannot be applied to obtain reimbursement out of federal disability insurance benefits inasmuch as federal law bars subjecting such funds to any legal process.

806. *Georges* v. *McClellan*, 409 U.S. 1120 (1973).

District court decision holding unconstitutional under due process clause Rhode Island prejudgment attachment statute is summarily affirmed.

807. *Gomez* v. *Perez*, 409 U.S. 535 (1973).

Texas law denying right of enforced paternal support to illegitimate children while granting it to legitimate children violates equal protection clause.

808. *Roe* v. *Wade*, 410 U.S. 113 (1973).

Texas statute making it a crime to procure or to attempt to procure an abortion except on medical advice to save the life of the mother infringes upon a woman's right of privacy protected by the due process clause of the Fourteenth Amendment.

Justices Concurring: Blackmun, Douglas, Brennan, Stewart, Marshall, Powell, and Chief Justice Burger.
Justices Dissenting: White and Rehnquist.

809. *Doe* v. *Bolton*, 410 U.S. 179 (1973).

Georgia statute permitting abortions under prescribed circumstances nevertheless invalidly imposed a number of procedural limitations: that the abortion be performed in an accredited hospital, be approved by a staff committee and two licensed physicians other than woman's own doctor, and be available only to residents.

Justices Concurring: Blackmun, Douglas, Brennan, Stewart, Marshall, Powell, and Chief Justice Burger.
Justices Dissenting: White and Rehnquist.

810. *Mahan* v. *Howell*, 410 U.S. 315 (1973).

Portion of Virginia apportionment statute assigning large numbers of naval personnel to actual location of station when evidence showed substantial numbers resided in surrounding areas distorted population balance of districts within the one county and was void.

811. *Whitcomb* v. *Communist Party of Indiana*, 410 U.S. 976 (1973).

District court decision holding invalid under First and Fourteenth Amendments Indiana statute requiring political party to submit oath that party has no relationship to a foreign government as a condition of ballot access is summarily affirmed.

812. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973).

New Mexico use tax may not constitutionally be applied on personal property that Indian tribe purchased out-of-state and installed as permanent improvement on off-reservation ski resort owned and operated by tribe.

813. *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164 (1973).

Arizona income tax is invalidly applied to Navajo Indian residing on reservation and whose income is wholly derived from reservation sources.

814. *New Jersey Welfare Rights Organization* v. *Cahill*, 411 U.S. 619 (1973).

New Jersey statute denying assistance to families in which parents are not ceremonially married denies equal protection to children in such families.

**Justices Concurring: Douglas, Brennan, Stewart, White, Marshall, Blacknum, Powell, and Chief Justice Burger.**
**Justice Dissenting: Rehnquist.**

815. *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973).

Wisconsin statute as interpreted to permit revocation of parole without a hearing denies due process of law.

816. *Parker* v. *Levy*, 411 U.S. 978 (1973).

District court decision voiding as arbitrary denial of equal protection Louisiana's constitutional provision and statute distributing among political subdivisions property relief fund is summarily affirmed.

817. *Miller* v. *Gomez*, 412 U.S. 914 (1973).

District court decision holding a denial of equal protection New York statute denying jury trial on issue of dangerousness to persons being committed to hospitals for criminally insane after felony indictment but before trial is summarily affirmed.

818. *Vlandis* v. *Kline*, 412 U.S. 441 (1973).

Connecticut statute creating irrebuttable presumption that student from out-of-state at time of application to state college remained nonresident for tuition purposes for entire student career violated due process clause.

**Justices Concurring: Stewart, Brennan, Marshall, Blackmun, and Powell.**
**Justice Concurring Specially: White.**
**Justices Dissenting: Chief Justice Burger and Rehnquist and Douglas.**

819. *Wardius* v. *Oregon*, 412 U.S. 470 (1973).

Oregon statute requiring defendant to give pretrial notice of alibi defense and names of supporting witnesses but denying defendant any reciprocal right of discovery of rebuttal evidence denies him due process of law.

820. *White* v. *Regester*, 412 U.S. 755 (1973).

Establishment of multimember legislative districts in certain Texas urban areas in context of pervasive electoral discrimination against blacks and Mexican-Americans denied equal protection of laws.

821. *White* v. *Regester*, 412 U.S. 783 (1973).

Texas congressional districting law creates districts with too great a population disparity and is void under equal protection clause.

822. *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973).

New York statute to reimburse nonpublic schools for administrative expenses incurred in carrying out state mandated examination and record keeping requirements but requiring no accounting and separating of religious and nonreligious uses violates establishment clause.

Justices Concurring: Chief Justice Burger and Stewart, Blackmun, Powell, and Rehnquist.
Justices Concurring Specially: Douglas, Brennan, and Marshall.
Justice Dissenting: White.

823. *Sugarman* v. *Dougall*, 413 U.S. 634 (1973).

New York statute providing that only United States citizens may hold permanent positions in competitive civil service violates equal protection clause.

Justices Concurring: Blackmun, Douglas, Brennan, Stewart, White, Marshall, Powell, and Chief Justice Burger.
Justice Dissenting: Rehnquist.

824. *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973).

New York education and tax laws providing grants to nonpublic schools for maintenance and repairs of facilities and providing tuition reimbursements and income tax benefits to parents of children attending nonpublic schools violate the establishment clause.

Justices Concurring: Powell, Douglas, Brennan, Stewart, Marshall, and Blackmun.
Justices Concurring and Dissenting: Chief Justice Burger and Rehnquist.
Justice Dissenting: White.

825. *Sloan* v. *Lemon*, 413 U.S. 825 (1973).

Pennsylvania statute providing for reimbursement of parents for portion of tuition expenses in sending children to nonpublic schools violates establishment clause.

**Justices concurring:** Powell, Douglas, Brennan, Stewart, Marshall, and Blackmun.
**Justices dissenting:** White, Rehnquist, and Chief Justice Burger.

826. Accord: *Grit* v. *Wolman*, 413 U.S. 901 (1973).

827. *Stevenson* v. *West*, 413 U.S. 902 (1973).

South Carolina legislative apportionment statute is invalid.

828. *Nelson* v. *Miranda*, 413 U.S. 902 (1973).

Arizona constitutional and statutory provisions denying public employment to aliens violates equal protection clause.

829. *Texas* v. *Pruett*, 414 U.S. 802 (1973).

Federal court decision that Texas statutory system that denies good time credit to convicted felons in jail pending appeal while allowing good time credit to incarcerated nonappealing felons unconstitutionally burdens right of appeal is summarily affirmed.

830. *Department of Game* v. *Puyallup Tribe*, 414 U.S. 44 (1973).

Washington State statute construed to prohibit net fishing by Indians is invalid.

831. *Kusper* v. *Pontikes*, 414 U.S. 51 (1973).

Illinois statute prohibiting one who has voted in one party's primary election from voting in another party's primary election for at least 23 months violates the First and Fourteenth Amendments.

**Justices concurring:** Stewart, Douglas, Brennan, White, Marshall, and Powell.
**Justice concurring Specially:** Chief Justice Burger.
**Justices dissenting:** Blackmun and Rehnquist.

832. *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973).

New York statute providing for cancellation of public contracts and disqualification of contractors from doing business with the State for refusal to waive immunity from prosecution and to testify concerning state contracts violates the Fifth Amendment privilege against self-incrimination.

833. *Danforth* v. *Rodgers*, 414 U.S. 1035 (1973).

District court decision invalidating Missouri abortion statute is summarily affirmed.

834. *Communist Party of Indiana* v. *Whitcomb*, 414 U.S. 441 (1974).

Indiana statute prescribing loyalty oath as qualification for access to ballot violates First and Fourteenth Amendments.

835. *O'Brien* v. *Skinner*, 414 U.S. 524 (1974).

New York election law provisions that permit persons incarcerated outside county of residence while awaiting trial to register and vote absentee while denying absentee privilege to persons incarcreated in county of residence denies equal protection.

**Justices concurring:** Chief Justice Burger and Douglas, Brennan, Stewart, White, Marshall, and Powell.
**Justices dissenting:** Blackmun and Rehnquist.

836. *Wallace* v. *Sims*, 415 U.S. 902 (1974).

District court decision holding invalid Alabama apportionment statute is summarily affirmed.

837. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250 (1974).

Arizona statute imposing one-year county residency requirement for eligibility for nonemergency medical care for indigents at state expense infringes upon right to travel and violates equal protection clause.

**Justices Concurring:** Marshall, Brennan, Stewart, White, and Powell.
**Justices Concurring Specially:** Douglas, Blackmun, and Chief Justice Burger.
**Justice Dissenting:** Rehnquist.

838. *Davis* v. *Alaska*, 415 U.S. 308 (1974).

Alaska statute protecting anonymity of juvenile offenders was unconstitutionally applied to prohibit cross-examination of prosecution witness for possible bias in violation of confrontation clause.

**Justices Concurring:** Chief Justice Burger and Douglas, Brennan, Stewart, Marshall, Blackmun, and Powell.
**Justices Dissenting:** White and Rehnquist.

839. *Smith* v. *Goguen*, 415 U.S. 566 (1974).

Massachusetts statute punishing anyone who treats the flag "contemptuously" without anchoring proscription to specified conduct and modes in unconstitutionally vague.

**Justices Concurring:** Powell, Douglas, Brennan, Stewart, and Marshall.
**Justice Concurring Specially:** White.
**Justices Dissenting:** Blackmun, Rehnquist, and Chief Justice Burger.

840. *Lubin* v. *Panish*, 415 U.S. 709 (1974).

California statute imposing a filing fee as the only means of getting on the ballot denied indigents equal protection.

841. *Schwegmann Bros. Giant Super Markets* v. *Louisiana Milk Comm.*, 416 U.S. 922 (1974).

District court decision holding invalid as burden on interstate commerce Louisiana statute construed to permit commission to regulate prices at which dairy products are sold outside the State to Louisiana retailers is affirmed.

842. *Beasley* v. *Food Fair*, 416 U.S. 653 (1974).

North Carolina right-to-work law giving employees discharged by reason of union membership cause of action against employer cannot be applied in case of supervisors in view of 29 U.S.C. § 164(a) which provides that no law should compel an employer to treat a supervisor as an employee.

843. *Indiana Real Estate Comm.* v. *Satoskar*, 417 U.S. 938 (1974).

District court decision invalidating Indiana statute limiting real estate dealer licenses to citizens is summarily affirmed.

844. *Marburger* v. *Public Funds for Public Schools*, 417 U.S. (1974).

District court decisions invalidating under establishment clause New Jersey laws providing reimbursement for parents of nonpublic school children for textbooks and other materials are summarily affirmed.

845. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

Florida statute compelling newspapers to publish free replies by political candidates criticized by newspapers violates First Amendment.

846. *Letter Carriers* v. *Austin*, 418 U.S. 264 (1974).

Virginia statute creating cause of action for "insulting words" as construed to permit recovery for use in labor dispute of words "scab" and similar words is preempted by federal labor law.

**Justices Concurring: Marshall, Brennan, Stewart, White, and Blackmun.**
**Justice Concurring Specially: Douglas.**
**Justices Dissenting: Powell, Rehnquist, and Chief Justice Burger.**

847. *Spence* v. *Washington*, 418 U.S. 405 (1974).

Washington State statute prohibiting "improper use" of flag or display of the flag with any emblem superimposed on it was invalidly applied to a person who taped a peace symbol on the flag in a way as not to damage it and who then displayed it upside down from his own property.

**Justices Concurring: Brennan, Stewart, Marshall, and Powell.**
**Justices Concurring Specially: Douglas and Blackmun.**
**Justices Dissenting: Rehnquist, White, and Chief Justice Burger.**

848. Accord: *Cahn* v. *Long Island Vietnam Moratorium Committee*, 418 U.S. 906 (1974).

849. *Franchise Tax Board* v. *United Americans*, 419 U.S. 890 (1974).

District court decision striking down under First Amendment a California statute providing state income-tax reductions for taxpayers sending their children to nonpublic schools is summarily affirmed.

**Justices concurring: Brennan, Douglas, Stewart, Marshall, Blackmun, and Powell.**
**Justices dissenting: White and Rehnquist and Chief Justice Burger.**

850. *Taylor* v. *Louisiana*, 419 U.S. 522 (1975).

Constitutional and statutory provisions that a woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service violates Sixth Amendment right of defendants to be tried before juries composed of a representative cross section of the community.

**Justices concurring:** White, Douglas, Brennan, Stewart, Marshall, Blackmun, and Powell.
**Justice concurring specially:** Chief Justice Burger.
**Justice dissenting:** Rehnquist.

851. *North Georgia Finishing* v. *Di-Chem*, 419 U.S. 601 (1975).

Georgia statutes permitting writ of garnishment to be issued in pending suits on conclusory affidavit of plaintiff, prescribing filing of bond as the only method of dissolving the writ, which deprives defendant of the use of the property pending the litigation, and making no provision for an early hearing violates Fourteenth Amendment's due process clause.

**Justices concurring:** White, Douglas, Brennan, Stewart, and Marshall.
**Justice concurring specially:** Powell.
**Justices dissenting:** Blackmun, Rehnquist, and Chief Justice Burger.

852. *Goss* v. *Lopez*, 419 U.S. 565 (1975).

Ohio statute authorizing suspension of public school students for up to 10 days for misconduct without a hearing denies students procedural due process in violation of the Fourteenth Amendment.

**Justices concurring:** White, Douglas, Brennan, Stewart, Marshall.
**Justices dissenting:** Powell, Blackmun, Rehnquist, and Chief Justice Burger.

853. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

Georgia statute making it a misdemeanor to publish or broadcast the name of a rape victim may not be applied to such publishing or broadcasting when the name is part of a public record; consistent with the First Amendment, publication of such public record information is absolutely privileged.

854. *Austin* v. *New Hampshire*, 420 U.S. 656 (1975).

State commuters income tax imposed on nonresidents violates the privileges and immunities clause, Art. V, § 2, cl. 1, inasmuch as the State imposed no income tax on its residents' domestic income and exempted from tax income earned by its residents outside the State, since the tax falls exclusively on nonresidents and is not offset even approximately by other taxes imposed upon residents alone.

**Justices concurring:** Marshall, Brennan, Stewart, White, Powell, Rehnquist, and Chief Justice Burger.
**Justice dissenting:** Blackmun.

855. *Stanton* v. *Stanton*, 421 U.S. 7 (1975).

Utah age of majority statute applied in the context of child support requirements obligating parental support of son to age 21 but daughter only to age 18 is an invalid gender classification under the equal protection clause of the Fourteenth Amendment.

856. *Hill* v. *Stone*, 421 U.S. 289 (1975).

Texas constitution and statutes and city charter limiting the right to vote in city bond issue elections to persons who have listed property for taxation in the election district in the year of the election is void under the equal protection clause of the Fourteenth Amendment.

**Justices concurring**: Marshall, Brennan, White, Blackmun, and Powell.
**Justices dissenting**: Rehnquist, Stewart, and Chief Justice Burger.

857. *Meek* v. *Pittenger*, 421 U.S. 349 (1975).

Pennsylvania laws authorizing direct provision to nonpublic school children of "auxiliary services", i.e., counseling, testing, speech and hearing therapy, etc., and loans to the nonpublic schools for instructional material and equipment constitute unlawful assistance to religion and are invalid under First Amendment.

**Justices concurring**: Stewart, Douglas, Brennan, Marshall, Blackmun, and Powell.
**Justices dissenting**: Chief Justice Burger and White and Rehnquist.

858. *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

State statute making it a misdemeanor, by sale or circulation of any publication, to encourage or prompt the procuring of an abortion, as applied to the editor of a weekly newspaper who published an advertisement of an out-of-state abortion, is in violation of the First Amendment.

**Justices concurring**: Blackmun, Douglas, Brennan, Stewart, Marshall, Powell, and Chief Justice Burger.
**Justices dissenting**: Rehnquist and White.

859. *Herring* v. *New York*, 422 U.S. 853 (1975).

Statute granting trial judge in a nonjury criminal case the power to deny counsel the opportunity to make a summation of the evidence before the rendition of judgment violates the Sixth Amendment.

**Justices concurring**: Stewart, Douglas, Brennan, White, Marshall, and Powell.
**Justices dissenting**: Rehnquist, Blackmun, and Chief Justice Burger.

860. *Turner* v. *Department of Employment Security*, 423 U.S. 44 (1975).

Utah statute making pregnant women ineligible for unemployment compensation for a period extending from 12 weeks before expected childbirth until six weeks following violates Fourteenth Amendment due process clause.

**Justices concurring**: Brennan, Stewart, White, Marshall, and Powell.
**Justices dissenting**: Rehnquist and Blackmun and Chief Justice Burger, (from summary action only).

861. *Schwartz* v. *Vanasco*, 423 U.S. 1041 (1976).

District court decision invalidating as overboard under the First Amendment New York law prohibiting attacks on candidate based on race, sex, religion, or ethnic background and prohibiting misrepresentations of candidate's qualifications, positions, or political affiliation is summarily affirmed.

862. *Tucker* v. *Salera*, 424 U.S. 959 (1976).

District court decision voiding Pennsylvania election law provision requiring that candidates of "political bodies" collect nominating petition signatures between 10th and 7th Wednesdays prior to primary election and file them no later than 7th Wednesday prior to primary is unconstitutional insofar as it disqualifies papers signed after 7th Wednesday is affirmed summarily.

863. *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976).

Montana laws imposing personal property taxes, vendor license fees, and a cigarette sales tax may not constitutionally be applied to reservation Indians under supremacy clause because federal statutory law precludes such application.

864. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

State statute declaring it unprofessional conduct for a licensed pharmacist to advertise the price of prescription drugs violates the First Amendment right of citizens to receive the information thus suppressed.

Justices concurring: Blackmun, Brennan, Stewart, White, Marshall, and Powell.
Justice concurring specially: Chief Justice Burger.
Justice dissenting: Rehnquist.

865. Accord: *California State Board of Pharmacy* v. *Terry*, 426 U.S. 913 (1976).

866. *Bryan* v. *Itasca County*, 426 U.S. 373 (1976).

Minnesota laws imposing personal property taxes cannot under the supremacy clause be constitutionally applied to an Indian's mobile home located on the reservation.

867. *Kleppe* v. *New Mexico*, 426 U.S. 529 (1976).

State law providing for the rounding up and sale by a state agency of "estrays" cannot under the supremacy clause be constitutionally applied to unbranded and unclaimed horses and burros on public lands of the United States that are protected by federal law.

868. *Machinists & Aerospace Workers* v. *WERC*, 427 U.S. 132 (1976)

Wisconsin statute proscribing concerted efforts to interfere with production, except through actual strikes, by employees cannot under the supremacy clause be constitutionally applied to union members' concerted refusal to work overtime during negotiations for renewal of an expired contract since such conduct was intended by Congress to be regulable by neither the States nor the NLRB.

Justices concurring: Brennan, White, Marshall, Blackmun, Powell, and Chief Justice Burger.
Justices dissenting: Stevens, Stewart, Rehnquist.

869. *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976).

Missouri abortion law that required, *inter alia*, spousal and parental consent before abortion could be performed in appropriate circumstances, and that proscribed the saline amniocentesis abortion procedure after the first 12 weeks of pregnancy was an unconstitutional infringement upon the liberty of pregnant women who wished to terminate their pregnancies.

**Justices concurring:** Blackmun, Brennan, Stewart, Marshall, Powell.

**Justice dissenting:** Stevens (on parental consent).

**Justices dissenting:** White, Rehnquist, Chief Justice Burger.

870. Accord: *Gerstein* v. *Coe*, 428 U.S. 901 (1976).

871. *Woodson* v. *North Carolina*, 428 U.S. 280 (1976).

State statute making death penalty mandatory upon conviction of first-degree murder violates Eighth Amendment, since determination to impose death must be individualized.

**Justices concurring:** Stewart, Powell, Stevens.

**Justices concurring specially:** Brennan and Marshall.

**Justices dissenting:** Rehnquist, Blackmun, White, and Chief Justice Burger.

872. Accord: *Roberts* v. *Louisiana*, 428 U.S. 325 (1976).

873. Accord: *Williams* v. *Oklahoma*, 428 U.S. 907 (1976).

874. *Sendak* v. *Arnold*, 429 U.S. 968 (1976).

Statute requiring all abortions, including those during first trimester of pregnancy, to be performed in hospital or licensed health facility was held unconstitutional by district court and decision is primarily affirmed.

**Justices concurring:** Brennan, Stewart, Marshall, Blackmun, Powell, Stevens.

**Justices dissenting:** White, Rehnquist, and Chief Justice Burger.

875. *Exon* v. *McCarthy*, 429 U.S. 972 (1976).

District court holding that statutory scheme that fails to provide method by which independent candidate for President may appear on ballot other than through certification by political party violates First and Fourteenth Amendments is summarily affirmed.

876. *Craig* v. *Boren*, 429 U.S. 190 (1976).

Statutory prohibition of sale of "nonintoxicating" 3.2% beer to males under 21 and to females under 18 constituted an impermissible gender-based classification that denied to males 18–20 equal protection.

**Justices concurring:** Brennan, White, Marshall, Blackmun, Powell, and Stevens.

**Justice concurring specially:** Stewart.

**Justices dissenting:** Chief Justice Burger and Rehnquist.

877 *Lefkowitz* v. *C.D.R. Enterprises*, 429 U.S. 1031 (1977).

District court decision holding invalid as a discrimination against aliens a law granting public works employment preference to citizens who have resided in State for at least 12 months is summarily affirmed.

878. *Boston Stock Exchange* v. *State Tax Comm.*, 429 U.S. 318 (1977).

Transfer tax on securities transactions structured so that transactions involving an out-of-state sale are taxed more heavily than most transactions involving a sale within the State discriminates against interstate commerce in violation of the commerce clause.

879. *Guste* v. *Weeks*, 429 U.S. 1056 (1977).

District court decision voiding statute that effectively forbade abortions, that prohibited publicizing availability of abortion services, that required spousal or parental consent, and that forbade state employees to recommend abortions is summarily affirmed.

880. *Bowen* v. *Women's Services*, 429 U.S. 1067 (1977).

District court decision invalidating parental consent requirement for abortion upon minor during first 12 weeks of pregnancy is summarily affirmed.

881. *Jones* v. *Rath Packing Co.*, 430 U[illegible] 519 (1977).

Statutory imposition of weight requirements in packaging for sale of bacon and flour which did not allow for loss of weight resulting from moisture loss during distribution while the applicable federal law does is invalid (1) as to bacon because of express federal law and (2) as to flour because adherence to state law would defeat a purpose of the federal law and hence supremacy clause requires that both state laws yield to federal.

**Justices concurring:** Marshall, Brennan, White, Blackmun, Powell, Stevens, and Chief Justice Burger.
**Justices dissenting:** Rehnquist and Stewart as to flour.

882. *Wooley* v. *Maynard*, 430 US. 705 (1977).

Requirement that state license plates bear motto "Live Free or Die" and making it a misdemeanor to obscure the motto coerce dissemination of ideological message by person on his own property and violates First Amendment.

**Justices concurring:** Chief Justice Burger and Brennan, Stewart, White, Marshall, Powell, and Stevens.
**Justices dissenting:** Rehnquist and Blackmun.

883. *Trimble* v. *Gordon*, 430 U.S. 762 (1977).

Law allowing illegitimate children to inherit by intestate succession only from their mothers while legitimate children may take from both parents denies illegitimates the equal protection of the laws.

**Justices concurring:** Powell, Brennan, White, Marshall, and Stevens.
**Justices dissenting:** Chief Justice Burger and Stewart, Blackmun, and Rehnquist.

884. *United States Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977).

Retroactive repeal of a statutory covenant under which bonds had been sold by Port Authority, covenant limiting the authority's ability to subsidize rail passenger transportation from revenues and reserves pledged as security for the bonds, impaired the obligation of the contract and violated Article I, § 10, cl. 1.

**Justices concurring: Blackmun, Rehnquist, Stevens, and Chief Justice Burger.**
**Justices dissenting: Brennan, White, and Marshall.**

885. *Chappelle* v. *Greater Baton Rouge Airport Dist.*, 431 U.S. 159 (1977).

Statutory qualification of ownership of assessed property in jurisdiction in which airport is located as condition of appointment to airport commission is invalid.

**Justices concurring: Chief Justice Burger and Brennan, Stewart, White, Marshall, Blackmun, Powell, and Stevens.**
**Justice dissenting: Rehnquist.**

886. *Douglas* v. *Seacoast Products*, 431 U.S. 265 (1977).

Statute prohibiting nonresidents from carrying on fishing within certain state waters is preempted by federal enrollment and licensing laws that grant affirmative right to fish in coastal waters and is invalid under supremacy clause.

887. *Roberts* v. *Louisiana*, 431 U.S. 633 (1977).

Statute imposing mandatory death sentence upon one convicted of first-degree murder of police officer engaged in performance of his duties violates Eighth Amendment.

**Justices concurring: Stewart, Powell and Stevens.**
**Justices concurring specially: Brennan and Marshall.**
**Justices dissenting: Chief Justice Burger and Blackmun, White, and Rehnquist.**

888. *Carey* v. *Population Services Int.*, 431 U.S. 678 (1977).

Law making it a crime (1) for any person to sell or distribute contraceptives to minors under 16, (2) for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over, and (3) for anyone to advertise or display contraceptives violates First and Fourteenth Amendments.

**Justices concurring: Brennan, Stewart, Marshall, and Blackmun.**
**Justices concurring specially: White, Powell, and Stevens.**
**Justices dissenting: Chief Justice Burger and Rehnquist.**

889. *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977).

Statute automatically removing from office and disqualifying from any office for next five years any political party officer who refuses to testify or to waive immunity against subsequent criminal prosecution when subpoenaed before an authorized tribunal violates Fifth Amendment self-incrimination clause.

Justices concurring: Chief Justice Burger, Stewart, White, Blackmun, and Powell.
Justices concurring specially: Brennan and Marshall.
Justice dissenting: Stevens.

890. *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977).

Statutory provision barring from access to state financial assistance for higher education aliens who have not either applied for citizenship or affirmed the intent to apply when they qualify violates equal protection clause.

Justices concurring: Blackmun, Brennan, White, Marshall, and Stevens.
Justices dissenting: Chief Justice Burger, Powell, Stewart, Rehnquist.

891. *Hunt* v. *Washington State Apple Advertising Comm.*, 432 U.S. 333 (1977).

Statute requiring that all apples sold or shipped into State in closed containers be identified by no grade on containers other than applicable federal grade or a designation that apples are ungraded violates commerce clause by burdening and discriminating against interstate sale of Washington apples.

892. *Wolman* v. *Walter*, 433 U.S. 229 (1977).

Provision of loan of instructional material and equipment to nonpublic religious schools and transportation and services for field trips for nonpublic school pupils violates First Amendment religion clauses.

Justices concurring: Blackmun, Brennan, Stewart, Marshall, and Stevens.
Justices dissenting: Chief Justice Burger, White, Rehnquist; Powell (as ot field trips only).

893. *Shaffer* v. *Heitner*, 433 U.S. 186 (1977).

Statute authorizing a court of the State to take jurisdiction of a lawsuit by sequestering property of defendant that happens to be located in State violates due process clause because it permits state courts to exercise jurisdiction in the absence of sufficient contacts among defendant, litigation, and State.

894. *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977).

Statutory height and weight requirements for prison guards have impermissible discriminatory effect upon women and under supremacy clause must yield to federal fair employment law.

Justices concurring: Stewart, Brennan, Marshall, Blackmun, Powell, Rehnquist, Stevens, and Chief Justice Burger.
Justice dissenting: White.

895 *Jernigan* v. *Lendall*, 433 U.S. 901 (1977).

District court decision invalidating law that requires independent candidate for office to file for office no later than first Tuesday in April is summarily affirmed.

896. *Coker* v. *Georgia*, 433 U.S. 584 (1977).

Statute authorizing death penalty as punishment for rape violates Eighth Amendment.

Justices concurring: White, Stewart, Blackmun, and Stevens.
Justices concurring specially: Brennan, Marshall, and Powell.
Justices dissenting: Chief Justice Burger and Rehnquist.

897. *Maher* v. *Buckner*, 434 U.S. 898 (1977).

Statutory rule rendering ineligible for welfare benefits individuals who have transferred assets within seven years of applying for benefits unless they can prove the transfer was made for "reasonable consideration" is inconsistent with Social Security Act and therefore falls under supremacy clause.

898. *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977).

Authorization for reimbursement to nonpublic schools for performance of certain state-mandated services for remainder of school year to replace reimbursement program declared unconstitutional also violates First Amendment religion clause.

Justices concurring: Stewart, Brennan, Marshall, Blackmun, Powell, and Stevens.
Justices dissenting: White, Rehnquist, and Chief Justice Burger.

899. *Zablocki* v. *Redhail*, 434 U.S. 374 (1978).

Statute that requires court permission to marry of any resident having minor children and in his custody and who is under a court order to support and that conditions permission on showing that support obligation has been met and that the children are not and are not likely to become public charges violates equal protection clause.

Justices concurring: Marshall, Brennan, White, Blackmun, and Chief Justice Burger.
Justices concurring specially: Stewart, Powell, and Stevens.
Justice dissenting: Rehnquist.

900. *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978).

Certain provisions of statute imposing design or safety standards on oil tankers using state waters and banning operation in those waters of tankers exceeding certain weights, as well as certain pilotage requirements, are invalid under the supremacy clause as conflicting with federal law.

Justices concurring: White, Stewart, Blackmun, Powell, and Stevens, and Chief Justice Burger.
Justices dissenting (in part): Marshall, Brennan, and Rehnquist.

901. *Ballew* v. *Georgia*, 435 U.S. 223 (1978).

Provisions of state law directing certain trials in criminal cases to be before five-person juries unconstitutionally impair the right to trial by jury.

902. *McDaniel* v. *Paty*, 435 U.S. 618 (1978).

Statutory qualification of convention delegates by incorporating state constitutional ban on ministers or priests violates the Constitution.

903. *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978).

Criminal statute that banned banks and business corporations from making expenditures to influence referendum votes on any questions not affecting the property, business, or assets of the corporation violated the First Amendment.

Justices concurring: Powell, Stewart, Blackmun, Stevens, and Chief Justice Burger.
Justices dissenting: White, Brennan, Marshall, and Rehnquist.

904. *Landmark Communications* v. *Virginia*, 435 U.S. 829 (1978).

Statute making it a misdemeanor to divulge information regarding proceedings before a state judicial review commission cannot constitutionally be applied to persons who are not parties before the commission.

905. *Hicklin* v. *Orbeck*, 437 U.S. 518 (1978).

Law mandating that state residents be preferred to nonresidents in employment on oil and gas pipeline work violates Article IV, § 2, the privileges and immunities clause.

906. *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978).

Law prohibiting importation into State for disposal at landfills of solid or liquid waste violates commerce clause.

Justices concurring: Stewart, Brennan, White, Marshall, Blackmun, Powell, and Stevens.
Justices dissenting: Rehnquist and Chief Justice Burger.

907. *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978).

Statutory imposition on existing negotiated collective bargaining agreements of different terms respecting pensions impaired the employer's rights under the obligation of contracts clause.

Justices concurring: Stewart, Powell, Rehnquist, Stevens, and Chief Justice Burger.
Justices dissenting: Brennan, White, and Marshall.

908. *Lockett* v. *Ohio*, 438 U.S. 586 (1978).

Statute authorizing imposition of death penalty upon conviction of first-degree murder unconstitutionally restricted consideration of mitigating factors by the sentencing party.

Justices concurring: Chief Justice Burger and Stewart, Powell, and Stevens.
Justices concurring specially: White, Marshall, and Blackmun.
Justices dissenting: Rehnquist.

909. *Duren* v. *Missouri*, 439 U.S. 357 (1979).

Statute, implementing a constitutional provision, which provides for the excusal of any women requesting exemption from jury service, operates to violate the fair cross section requirement of the Sixth and Fourteenth Amendments because of the underrepresentation of women jurors that results.

Justices concurring: White, Brennan, Stewart, Marshall, Blackmun, Powell, Stevens, and Chief Justice Burger.
Justice dissenting: Rehnquist.

910. *Colautti* v. *Franklin*, 439 U.S. 379 (1979).

Provisions of abortion law that require the physician to make a determination that the fetus is not viable and if it is viable to exercise the same care to preserve the fetus' life and health as would be required in the case of a fetus intended to be born alive are void for vagueness under the due process clause of the Fourteenth Amendment.

Justices concurring: Blackmun, Brennan, Stewart, Marshall, Powell, and Stevens.
Justices dissenting: White, Rehnquist, and Chief Justice Burger.

911. *Miller* v. *Youakim*, 440 U.S. 125 (1979).

Provision of state law differentiating between children who reside in foster homes with relatives and those who do not reside with relatives and giving the latter greater benefits than the former conflicts with federal law which requires the same benefits be provided regardless whether the foster home is operated by a relative and thus must yield under the supremacy clause of Article VI.

912. *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173 (1979).

Law requiring new political parties and independent candidates to obtain 5% of the number of persons who voted at the previous election for such office in order to get on the ballot in political subdivisions of the State, insofar as it applies to mandate the obtaining of a greater number and proportion of signatures than is required to get on the ballot for statewide office lacks a rational basis and violates the equal protection clause of the Fourteenth Amendment.

Justices concurring: Marshall, Brennan, Stewart, White, and Powell.
Justices concurring specially: Blackmun, Stevens, Rehnquist, and Chief Justice Burger.

913. *Orr* v. *Orr*, 440 U.S. 268 (1979).

Alabama statute which imposes alimony obligations on husbands but not wives violates the equal protection clause of the Fourteenth Amendment.

Justices concurring: Brennan, Stewart, White, Marshall, Blackmun, and Stevens.
Justices dissenting (on other grounds): Powell, Rehnquist, and Chief Justice Burger.

914. *Ashcroft* v. *Freiman*, 440 U.S. 941 (1979).

Federal court decision invalidating under the Fourteenth Amendment's due process clause of Missouri statute requiring doctor to verbally inform any woman seeking abortion that, if live born infant results, woman will lose her parental rights is summarily affirmed.

915. *Quern* v. *Hernandez*, 440 U.S. 951 (1979).

District court decision voiding as denial of due process under Fourteenth Amendment Illinois attachment law because it permits attachment prior to filing of complaint and prior to notice to debtor is summarily affirmed.

916. *Burch* v. *Louisiana*, 441 U.S. 130 (1979).

State statutory implementation of constitutional provision permitting conviction for a nonpetty offense by five out of six jurors violates the right to trial by jury guaranteed by the Sixth and Fourteenth Amendments.

917. *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141 (1979).

Imposition of tax upon electricity produced in State and sold outside State which is not offset against other taxes as is the case with electricity sold within State violates federal statute prohibiting any State from taxing the generation or transmission of electricity in a manner that discriminates against out-of-state consumers and thus is unenforceable under the supremacy clause.

918. *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979).

Statute prohibiting transportation or shipment outside the State for sale natural minnows seined or procured from waters within the State violates the commerce clause.

Justices concurring: Brennan, Stewart, White, Marshall, Blackmun, Powell, and Stevens.
Justices dissenting: Rehnquist and Chief Justice Burger.

919. *Caban* v. *Mohammed*, 441 U.S. 380 (1979).

New York law permitting an unwed mother but not an unwed father to block the adoption of their child by withholding consent is an impermissible gender distinction violative of the equal protection clause of the Fourteenth Amendment.

Justices concurring: Powell, Brennan, White, Marshall, Blackmun.
Justices dissenting: Stewart, Stevens, Rehnquist, and Chief Justice Burger.

920. *Japan Lines* v. *County of Los Angeles*, 441 U.S. 434 (1979).

Imposition of California ad valorem property tax upon cargo containers which are based, registered, and subjected to property tax in Japan results in multiple taxation of instrumentalities of foreign commerce and violates the commerce clause.

Justices concurring: Blackmun, Brennan, Stewart, White, Marshall, Powell, Stevens, and Chief Justice Burger.
Justice dissenting: Rehnquist.

921. *Beggans* v. *Public Funds for Public Schools*, 442 U.S. 907 (1979).

Federal court decision invalidating New Jersey statute that allowed taxpayers personal deduction from gross income for each of their dependent children attending nonpublic elementary or secondary schools as a violation of the First Amendment's religion clause is summarily affirmed.

922. *Torres* v. *Puerto Rico*, 442 U.S. 465 (1979).

Statute authorizing police to search the luggage of any person arriving in Puerto Rico from the United States without a warrant or probable cause violates the Fourth Amendment.

923. *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

West Virginia statute that makes it a crime for a newspaper to publish, without the written approval of the juvenile court, the name of any youth charged as a juvenile offender violates the First and Fourteenth Amendments.

924. *Bellotti* v. *Baird*, 443 U.S. 622 (1979).

Massachusetts law requiring parental consent for an abortion for a woman under age 18 and providing for a court order permitting abortion for good cause if parental consent is refused violates the due process clause of the Fourteenth Amendment.

Justices concurring: Powell, Stewart, Rehnquist, and Chief Justice Burger.
Justices concurring specially: Stevens, Brennan, Marshall, Blackmun.
Justice dissenting: White.

925. *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum*, 445 U.S. 97 (1980).

California statute requiring all wine producers and wholesalers to file fair trade contracts or price schedules with the State and to follow the price lists is a resale price maintenance scheme in violation of the Sherman Act and cannot stand under the supremacy clause.

926. *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980).

Texas public nuisance statute authorizing state judges, on the basis of a showing that a theater exhibited obscene films in the past, to enjoin its future exhibition of films not yet found to be obscene is an invalid prior restraint violative of the First and Fourteenth Amendments.

Justices concurring: Brennan, Stewart, Marshall, Blackmun, Stevens.
Justices dissenting (on other grounds): Powell and Chief Justice Burger.
Justices dissenting: White and Rehnquist.

927. *Vitek* v. *Jones*, 445 U.S. 480 (1980).

Nebraska statute which authorizes the authorities to summarily transfer a prison inmate from jail to another institution if a physician finds he suffers from a mental disease or defect and cannot be given proper treatment in jail violates the liberty guaranteed by the due process clause of the Fourteenth Amendment unless the transfer is accompanied by adequate procedural protections.

Justices concurring: White, Brennan, Marshall, Powell, Stevens.
Justices dissenting (on other grounds): Stewart, Blackmun, Rehnquist, and Chief Justice Burger.

928. *Payton* v. *New York*, 445 U.S. 573 (1980).

Statute authorizing police officers to enter a private residence without a warrant and without necessarily exigent circumstances to effectuate a felony arrest violates the Fourth and Fourteenth Amendments.

Justices concurring: Stevens, Brennan, Stewart, Marshall, Blackmun, Powell.
Justice dissenting: White, Rehnquist, Chief Justice Burger.

929. *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980).

Missouri workers' compensation law denying a widower benefits on his wife's work-related death unless he either is mentally or physically incapacitated or proves dependence on her earnings but granting a widow death benefits regardless of her dependency is a gender discrimination violative of the equal protection clause of the Fourteenth Amendment.

Justices concurring: White, Brennan, Stewart, Marshall, Blackmun, Powell, and Chief Justice Burger.
Justice dissenting: Rehnquist.

930. *Lewis* v. *BT Investment Managers*, 447 U.S. 27 (1980).

Florida statute prohibiting out-of-state banks, bank holding companies, and trust companies from owning or controlling a business within the State that sells investment advisory services violates the commerce clause.

931. *Washington* v. *Confederated Tribes*, 447 U.S. 134 (1980).

Imposition of state motor vehicle excise tax and mobile home, camper, and trailer taxes to vehicles owned by the Tribe or its members and used both on and off the reservation violates federal law and cannot stand under the supremacy clause.

Justices concurring: White, Brennan, Marshall, Blackmun, Powell, Stevens, and Chief Justice Burger.
Justices dissenting: Stewart and Rehnquist.

932. *Carey* v. *Brown*, 447 U.S. 455 (1980).

Illinois statute that prohibits picketing of residences or dwellings, but exempts peaceful picketing of such buildings that are places of employment in which there is a labor dispute violates the equal protection clause of the Fourteenth Amendment.

Justices concurring: Brennan, Stewart, White, Marshall, Powell, Stevens.
Justices dissenting: Rehnquist, Blackmun, Chief Justice Burger.

933. *Beck* v. *Alabama*, 447 U.S. 625 (1980).

Capital punishment statute which forbids giving the jury the option of convicting a defendant of a lesser included offense but requiring it to convict on the capital offense or acquit violates the Eighth and Fourteenth Amendments.

934. *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980).

Imposition of Arizona motor carrier license tax and use fuel tax to nonIndian enterprise authorized to do business in Arizona but operating entirely on reservation conflicts with federal law and cannot stand under the supremacy clause.

Justices concurring: Marshall, Brennan, White, Blackmun, Powell, and Chief Justice Burger.

Justices dissenting: Stevens, Stewart, Rehnquist.

935. *Central Machinery Co.* v. *Arizona State Tax Comm.*, 448 U.S. 160 (1980).

Imposition of tax upon sale of farm machinery by non-Indian enterprise to Indian tribe which took place on the reservation, although the enterprise did not reside on the reservation conflicts with federal law and is invalid under the supremacy clause.

Justices concurring: Marshall, Brennan, White, Blackmun, and Chief Justice Burger.

Justices dissenting: Stewart, Powell, Rehnquist, Stevens.

936. *Minnesota* v. *Planned Parenthood*, 448 U.S. 901 (1980).

Federal court decision holding that statute authorizing grants for prepregnancy family planning to hospitals and health maintenance organizations but prohibiting such grants to other nonprofit organizations if they perform abortions violates equal protection clause is summarily affirmed.

## ORDINANCES HELD UNCONSTITUTIONAL

**[P. 1785, at end of list, add:]**

94. *Cason* v. *City of Columbia*, 409 U.S. 1053 (1972).

Ordinance prohibiting use of abusive language toward another as applied by court below without limitation to fighting words cannot sustain conviction.

95. *City of Burbank* v. *Lockheed Air Terminal*, 411 U.S. 624 (1973).

Ordinance placing an 11 p.m. to 7 a.m. curfew on jet take-offs from local airport is invalid as in conflict with the regulatory scheme of federal statutory control.

**Justices Concurring:** Douglas, Brennan, Blackmun, Powell, and Chief Justice Burger.
**Justices Dissenting:** Rehnquist, Stewart, White, and Marshall.

96. *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974).

Ordinance interpreted by state courts to punish the use of opprobrious words to police officer without limitation of offense to uttering of fighting words is invalid.

**Justices Concurring:** Brennan, Douglas, Stewart, White, and Marshall.
**Justice Concurring Specially:** Powell.
**Justices Dissenting:** Blackmun, Rehnquist, and Chief Justice Burger.

97. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975).

A municipal ordinance making it a public nuisance and a punishable offense for a drive-in movie theater to exhibit films containing nudity, when the screen is visible from a public street or place, is facially invalid as an infringement of First Amendment rights.

**Justices concurring:** Powell, Douglas, Brennan, Stewart, Marshall, Blackmun.
**Justices dissenting:** White, Rehnquist, Chief Justice Burger.

98. *Hynes* v. *Mayor of Oradell*, 425 U.S. 610 (1976).

Municipal ordinance requiring that advance written notice be given to local police by any person desiring to canvass, solicit, or call from house to house for a charitable or political purpose held void for vagueness.

**Justices concurring:** Chief Justice Burger and Brennan, Stewart, White, Marshall, Blackmun, and Powell.
**Justice dissenting:** Rehnquist.

99. *Linmark Associates* v. *Township of Willingboro*, 431 U.S. 85 (1977).

Ordinance prohibiting posting of real estate "For Sale" and

"Sold" signs for the purpose of stemming what the township perceived as flight of white homeowners violated the First Amendment.

100. *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977).

Zoning ordinance that limited housing occupancy to members of single family and restrictively defined family so as to prevent an extended family, i.e., two grandchildren by different children residing with grandmother, violated due process clause.

Justices concurring: Powell, Bennan, Marshall, and Blackmun.
Justice concuring specially: Stevens.
Justices dissenting: Stewart, Rehnquist, and White; Burger (on other grounds).

101. *Carter* v. *Miller*, 434 U.S. 356 (1978).

Lower court's invalidation on equal protection grounds of ordinance that permanently denies public chauffeur's license to applicants previously convicted of certain crimes while making revocation of previously licensed persons convicted of same offenses discretionary is affirmed by an equally divided Court.

102. *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980).

Ordinance prohibiting door-to-door or on-the-street solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for "charitable purposes" violates First and Fourteenth Amendment speech protections.

Justices concurring: White, Brennan, Stewart, Marshall, Blackmun, Powell, Stevens, and Chief Justice Burger.
Justice dissenting: Rehnquist.

103. *Ventura County* v. *Gulf Oil Corp.*, 445 U.S. 947 (1980).

County zoning ordinances governing oil exploration and extraction activities cannot be applied to company which holds lease from United States Government because federal law preempts the field.

# SUPREME COURT DECISIONS OVERRULED BY SUBSEQUENT DECISIONS

[P. 1797, at end of list, add:]

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| • 144. *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973). | *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389 (1928). |
| • 145. *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484 (1973). | *Ahrens* v. *Clark*, 335 U.S. 188 (1948). |
| • 146. *Miller* v. *California*, 413 U.S. 15 (1973). | *A Book Named "John Cleland's Memoirs of a Woman of Pleasure"* v. *Attorney General*, 383 U.S. 413 (1966). |
| • 147. *North Dakota Pharmacy Board* v. *Snyder's Drug Stores*, 414 U.S. 156 (1973). | *Liggett Co.* v. *Baldridge*, 278 U.S. 105 (1928). |
| • 148. *Edelman* v. *Jordan*, 415 U.S. 651 (1974). | *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (in part); *State Dept. of Health & Rehabilitation Services* v. *Zarate*, 407 U.S. 918 (1972); *Sterrett* v. *Mothers' & Children's Rights Organization*, 409 U.S. 809 (1972). |
| • 149. *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974). | *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) (in part). |
| • 150. *Taylor* v. *Louisiana*, 419 U.S. 522 (1975). | *Hoyt* v. *Florida*, 368 U.S. 57 (1961) (in effect). |
| • 151. *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975). | *Schooner Catherine* v. *Dickinson*, 17 How. (58 U.S.) 170 (1854). |
| • 152. *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976). | *Low* v. *Austin*, 13 Wall. (80 U.S.) 29 (1872). |
| • 153. *Dove* v. *United States*, 423 U.S. 325 (1976). | *Durham* v. *United States*, 401 U.S. 481 (1971). |
| • 154. *Hudgens* v. *NLRB*, 424 U.S. 507 (1976). | *Amalgamated Food Employees Union* v. *Logan Valley Plaza*, 391 U.S. 308 (1968). |
| • 155. *Virginia Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). | *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942). |
| • 156. *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). | *Maryland* v. *Wirtz*, 392 U.S. 183 (1968). |
| • 157. *Machinists & Aerospace Workers* v. *WERC*, 427 U.S. 132 (1976). | *UAW* v. *WERB*, 336 U.S. 245 (1949). |
| • 158. *City of New Orleans* v. *Dukes*, 427 U.S. 297 (1976). | *Morey* v. *Doud*, 354 U.S. 457 (1957). |
| • 159. *Gregg* v. *Georgia*, 428 U.S. 153, 195 n. 47 (1976). | *McGautha* v. *California*, 402 U.S. 183 (1971). |
| • 160. *Craig* v. *Boren*, 429 U.S. 190, 210 n. 23 (1976). | *Goesaert* v. *Cleary*, 335 U.S. 464 (1948). |
| • 161. *Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). | *Bonelli Cattle Co.* v. *Arizona*, 414 U.S. 313 (1973). |

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| • 162. *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977). | *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951). |
| • 163. *Continental T. V. v. GTE Sylvania*, 433 U.S. 36 (1977). | *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). |
| • 164. *Shaffer v. Heitner*, 433 U.S. 186 (1977). | *Pennoyer v. Neff*, 95 U.S. 714 (1878). |
| • 165. *Dept. of Revenue v. Washington Stevedoring Cos.*, 435 U.S. 734 (1978). | *Puget Sound Stevedoring Co. v. State Tax Comm.*, 302 U.S. 90 (1937).<br>*Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947). |
| • 166. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). | *Monroe v. Pape*, 365 U.S. 167 (1961) (in part).<br>*City of Kenosha v. Bruno*, 412 U.S. 507 (1973) (in part).<br>*Moor v. County of Alameda*, 411 U.S. 693 (1973) (in part). |
| • 167. *Burks v. United States*, 437 U.S. 1 (1978). | *Bryan v. United States*, 338 U.S. 552 (1950) (in part).<br>*Sapir v. United States*, 348 U.S. 373 (1955) (in part).<br>*Yates v. United States*, 354 U.S. 298 (1957) (in part).<br>*Forman v. United States*, 361 U.S. 416 (1960) (in part). |
| • 168. *United States v. Scott*, 437 U.S. 82 (1978). | *United States v. Jenkins*, 420 U.S. 358 (1975). |
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